Supreme Court, U.S.
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# 82-1246

NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSE CORPORATION,
PETITIONER,

*v.*

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHARLES HIEKEN
470 Totten Pond Road
Boston, Massachusetts 02154-1981
Telephone: (617) 890-0110

BLAIR L. PERRY
60 State Street
Boston, Massachusetts 02109
Telephone: (617) 742-9100

*Counsel for Petitioner*

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 82-1230

BOSE CORPORATION

Plaintiff, Appellee,

v.

CONSUMERS UNION OF UNITED STATES, INC.,

Defendant, Appellant.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Anthony Julian, U.S. District Judge)

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Before

Davis*, Campbell and Bownes,

Circuit Judges.

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Michael N. Pollet, with whom Marshall Beil, Carol A. Schrager, Karpatkin, Pollet, Perlmutter & Beil, Nancy Gertner, and Silverglate & Gertner were on brief, for appellant.

Blair L. Perry, with whom Hale & Dorr, and Charles Hieken were on brief, for appellee.

James F. McHugh, Jane E. Serene, Bingham, Dana & Gould, and John Reinstein, on brief for Civil Liberties Union of Massachusetts, amicus curiae.

Henry R. Kaufman, on brief for Dow Jones & Company, Inc., et al., amici curiae.

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November 2, 1982

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* Of the Federal Circuit, sitting by designation.

Appendix

X1

BOWNES, Circuit Judge. This product disparagement case arises from an article evaluating the Bose 901 Series I stereo loudspeaker system by Consumer Reports, the monthly magazine of defendant-appellant, Consumers Union (CU). The district court found, in a bench trial limited to liability, that one statement in the article was false and was published with knowledge that it was false or with reckless disregard of its falsity. Bose Corp. v. Consumers Union of the United States, Inc., 508 F. Supp. 1249 (D. Mass. 1981) (Julian, J.). In a subsequent trial, damages were assessed in the amount of $115,296.00 plus interest and costs of $95,609.64. Bose Corp. v. Consumers Union of the United States, Inc., 529 F. Supp. 359 (D. Mass. 1981) (Caffrey, J.). CU

appeals both the finding of liability and the assessment of damages. We reverse on the issue of liability.

The Facts

Dr. Amar Bose founded the Bose Corporation in 1964 and is the corporation's principal owner and chief executive officer. CU conceded that he is an expert in the field of loudspeaker design.[1] Dr. Bose designed the Bose 901 in 1967, and it was first marketed late in that year or early in 1968. The shape and design of these loudspeakers were "unique and unconventional."

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[1] Dr. Bose received the degrees of Bachelor of Science, Master of Science, and Doctor of Science from the Massachusetts Institute of Technology (MIT). He coauthored a textbook entitled Introductory Network Theory and has been a faculty member in the Department of Electrical Engineering at MIT since 1956.

Bose, 508 F. Supp. at 1252. Each of the two loudspeaker cabinets in the system had the five-sided shape of a baseball home plate when viewed from above; one side in the front faced the listener and two sides in the rear faced away from the listener. The front face of each cabinet contained one driver[2] and each of the two rear faces had four drivers. As a result, the listener received one-ninth of the sound directly from the loudspeakers and eight-ninths of the sound by reflection off the wall behind the speakers.

Consumer Reports provides information about consumer products to mail subscribers and newsstand customers. At the time the

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[2] The drivers in a loudspeaker produce sound by physically displacing air.

article in question was published the magazine enjoyed "a very favorable reputation for independence, integrity, accuracy, and freedom from bias." Id. at 1252.[3] In the article, entitled "Loudspeakers," CU evaluated the quality and performance of twenty-four loudspeakers based on tests it had conducted. In a section boxed off from the main portion of the article and entitled "Some speakers of special interest," seven paragraphs of the eight-page article discussed the Bose 901. One other speaker, the Harmon-Kardon HD50, was also evaluated in this section.

The article explained the novel design

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[3] The district court found, and it was not disputed, that millions of readers relied on the magazine for product information and many would not make a substantial purchase without first consulting it.

of the Bose 901 as an attempt to simulate the sound patterns in a live concert hall, where listeners hear most of the sound after reflection off the walls and not directly from the orchestra. After describing the various components of the Bose system, the article next explained a test in which CU engineers compared the Bose 901 to another speaker[4] by using a special recording" of a cricket-like noisemaker moving from extreme left to extreme right." CU played the recording through the speakers in a listening room and "asked a panel to judge

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[4] This other speaker, the ADC 303AX, was evaluated in the main portion of the article and was one of only five "compact speakers tested (that) merited a check-rating." CU judged loudspeakers receiving this rating "to be relatively free of sound coloration and to have the best combination of wide sound ranges and smooth response."

the direction from which the sound appeared to come." CU concluded from this test that, "at least for pinpointing sharp noises, there appeared to be no difference between the speaker systems."

The next two paragraphs of the article described the results of a second test that CU performed on the Bose 901:

> We repeated the experiment using a variety of stereo sounds. When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.
>
> But after listening to a number of recordings, it became clear that the panelists could pinpoint the location of various instruments much more easily with a standard speaker than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be

> 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But, we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same spacial openness and size distortions as the stereo records.

The article then discussed the sound quality of the Bose 901 and stated that if the speaker had been tested with the main group of speakers "it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality . . . (but) the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound." The article concluded that because the Bose 901 "is so unusual . . . a prospective buyer must listen to it and judge it for himself." It is noted that the Bose 901 "requires a

gigantic amount of power" and recommended "an amplifier of 50 watts per channel for the deepest base response."[5]

The Findings of the District Court

The court determined that under the applicable law of product disparagement,[6] it was the plaintiff's burden to prove that the statements made by CU were of a disparaging or defamatory nature and that the statements were false. After concluding that "the Article, when read as a whole is disparaging," the court proceeded to analyze

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[5] The stated figure in watts for each loudspeaker in the main group ranged from a high of 27 watts to a low of 4 watts, with only one speaker requiring more than 15 watts.

[6] The parties had agreed that the law of their respective states, Massachusetts and New York, was identical with respect to the elements of this tort. Thus, choice of law was not an issue.

in detail each alleged factual error in the article to determine if it was false and if it was disparaging. It found that although the use of the words "panel and panelists" was misleading because there were only two persons doing the testing, it was not disparaging. Bose's attack on the "sound quality" critique was rejected on the grounds that "it is nothing more than an opinion and, as such, it cannot be proved to be true or false," citing to Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). The court found that Bose had not sustained its burden of proof that the statement as to the power requirements of the system was false.

The district court's finding of liability was based on part of one sentence in the article which reads: "Worse, individual

instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." The court, in its analysis, divided the sentence into two parts. It found that the description "seemed to grow to gigantic proportions" had not been proven false but found the statement that the instruments "tended to wander about the room" was both false and disparaging. The evidence on which this finding was based is summarized as follows. CU's two employees who conducted the listening test "testified that the wandering sounds they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed." CU conceded that the words "about the room" might not have described the wandering with precise accuracy, but argued that the wandering

of sound was important to consumers, not where it wandered. CU maintained that the statement was substantially true because it accurately described the important observation. The district court referred to testimony that an amount of movement is expected with all stereo speakers and concluded that the location of the sounds' movement was as important to a consumer as the fact of movement. Thus, the court found the statement not to be substantially true. After rejecting CU's argument that the statements in the article about "a violin appear(ing) to be 10 feet wide and a piano stretch(ing) from wall to wall" modified the statements about wandering sounds to imply that the wandering occurred along the wall between the speakers, the court stated that the ordinary meaning of

"about" the room was "around" the room. The court found the statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product." The use of the word "worse" to introduce the statement in the article showed that CU intended it to have a harmful effect.

Having determined that Bose had proved by a preponderance of the evidence that the statement about individual instruments tending to wander about the room was false and disparaging, the district court proceeded to analyze the impact of the first amendment on the standard of care required of CU. It cited several lower court decisions and discussed the first amendment balance between

the need for an uninhibited press and the legitimate state interest in compensating victims of defamation in concluding that the actual malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964), applies to product disparagement cases. It then applied the analysis of Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980), to conclude that "Bose is a public figure, at least with respect to the limited issues of the characteristics and quality of the Bose," and was required to show by clear and convincing proof that CU's false statement was published with knowledge that it was false or with reckless disregard of its truth of falsity. CU's project engineer, Arnold Seligson, conducted the listening test and wrote the words upon which the statements in the

article were based. Due in part to his demeanor at trial, the court found that Seligson's testimony as to what the words "about the room" meant was not credible. Seligson maintained that he perceived that the wandering sounds were confined to an area near the wall behind the loudspeakers. The court found that Seligson was too intelligent to not be aware of the ordinary meaning of "about" and thus concluded that Seligson knew at the time of publication that the article did not accurately describe the effects he had perceived during the test. In the court's view, this was clear and convincing proof that CU "published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity."

Our Review

As the parties acknowledge, the first amendment permeates our review. The question of the truth or falsity of the statement that individual instruments tended to wander about the room is intertwined with the question of whether that statement is one of opinion or fact; both questions are difficult to answer. CU argues that if the statement is considered in its full context it becomes clear that the statement is merely the opinion of the panelists who conducted the listening test. This full context i..cludes the tentative language that "instruments . . . seemed to grow" and "tended to wander," that "(w)ith orchestral music, such effects seemed inconsequential (although) we think they might become annoying when listening to soloists," and

finally that "the Bose system is so unusual that a prospective buyer must listen to it and judge for himself." CU cites numerous cases to support the proposition that a reviewer's published description of what he or she observed in a public performance, book, or restaurant is protected by the first amendment. Also, the Supreme Court has stated that "(u)nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (dictum) (footnote omitted). This statement of the Court implies that an opinion can be neither true nor false as a matter of constitutional law. The propo-

sition that an opinion can be neither true nor false also is reasonable as a matter of common sense.[7] The determination of whether a statement is one of opinion or fact, however, is difficult to make and perhaps unreliable as a basis for decision. Cf. W. Prosser, Law of Torts 820 (4th ed. 1971) (discussing the "unsatisfactory and unreliable" opinion limitation of common law and citing Titus, Statement of Fact Versus Statement of Opinion--Dispute in Fair Comment, 15 Vand. L. Rev. 1203 (1962);

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[7] Although perhaps a statement of opinion may be termed "false" if it is not genuinely an opinion held by the speaker. Cf. R. Sack, Libel, Slander and Related Problems 175-76 (1980). (The common law privilege of fair comment may be lost when an opinion "is not genuinely believed--a drama critic who pans a show because it has been produced by his hated brother-in-law . . . .")

Note, 62 Harv. L. Rev. 1207 (1949)).
Although CU's argument that the statement is an opinion is plausible, the seeming scientific nature of the article--indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" to describe the CU employees who performed the tests would support the position that the statements are factual. See Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2nd Cir.), cert. denied sub nom. Hotchner v. Doubleday, 434 U.S. 834 (1977) (An expression of an opinion may become as damaging as an assertion of fact, and liability for libel thus attach, if the writer indicates that "he has private, firsthand knowledge which substantiates the opinions he ex-

presses . . . ."). Similarly, and stemming at least in part from the uncertain nature of the statement as one of fact or opinion, it is difficult to determine with confidence whether it is true or false. As the district court noted, at trial the CU panelists, Seligson and Lefkow, "testified that the wandering sounds that they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed." Given the subjective nature of a listener's perceptions and the imprecise language employed in the CU article, we are not sure that the statement that instruments tended to wander about the room is false.

Due to our ultimate conclusion that Bose has failed to meet its burden of proof with respect to actual malice, however, we will

assume that the statement was both factual and false and not explore further the intricacies of these concepts.[8] Before analyzing actual malice, we should first briefly note our agreement with the district court that the statement in question disparaged Bose 901 speakers. CU concedes that the statement told readers that the "movement of individual instruments is more pronounced and localization therefore more

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[8] Because we have assumed the falsity of the statement, we need not address CU's argument that a plaintiff must prove falsity with clear and convincing proof. One commentator has noted that this standard of proof might also apply to the determination of whether a statement is factual. See R. Sack, supra n.7, at 180 & n.139 ("If a plaintiff must prove falsity . . . it would follow that he has the burden of persuading the court that the statement is not opinion and therefore capable of being false." (emphasis in original)).

difficult with the Bose than with conventional speakers." The tenor of the paragraph that contained the statement was clearly that of criticism; this is highlighted by the use of the word "worse" to introduce the statement. There can be little question that the statement was disparaging.

At oral argument Bose acknowledged that it does not dispute the finding of the district court that the corporation is a public figure with respect to the subject matter of the CU article. Bose also conceded that the rule of New York Times v. Sullivan applies in this case, and thus accepted the district court's conclusion that the actual malice standard applies to product disparagement cases. As we have indicated earlier, the district court analyzed both of these issues

at length and we accept its conclusions for the purposes of this case. Cf. Long v. Arcell, 618 F.2d 1145, 1147 & n.2 (5th Cir. 1980) (plaintiffs bound by stipulation at trial that they were public figures when the article was written).

We focus, therefore, on the district court's holding that Bose proved by clear and convincing evidence that CU published the words "individual instruments . . . tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity. In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitu-

tional law and that the plaintiff has indeed satisfied its burden of proof. See, e.g., New York Times v. Sullivan, 376 U.S. at 285 & n.26; Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); Long v. Arcell, 618 F.2d at 1147; Hochner v. Castillo-Puche, 551 F.2d at 913; R. Sack, supra note 7, at 560 (citing New York Times v. Sullivan, 376 U.S. at 285 and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54 (1971) (plurality opinion)); Oakes, Proof of Actual Malice in Defamation Actions: An Unresolved Dilemma, 7 Hofstra L. Rev. 655, 663, 701, 707-09 (1979); Restatement (Second) of Torts Section 580A comment g (1977). At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact.

See Long v. Arcell, 618 F.2d at 1147; Oakes, supra, at 711.

In New York Times v. Sullivan, the Supreme Court held that in order to prevail in a defamation action a public official must prove "that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court extended this requirement of proof to public figures. The Court has formulated the actual malice standard as requiring a showing that the statement was made with a "high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), and in another case as requiring "sufficient evidence to permit the

conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

A plaintiff required to prove actual malice under the New York Times v. Sullivan standard must do so with "convincing clarity." 376 U.S. at 285-86. This requirement, now the "clear and convincing proof" test, Gertz v. Robert Welch, Inc., 323 U.S. at 342; see Bruno & Stillman, 633 F.2d at 586 n.2, calls for the plaintiff to prove more than would be necessary under the preponderance of the evidence standard but something less than what the beyond a reasonable doubt standard requires. Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir. 1980); R. Sack, supra note 7, at 225.

Although these distinctions are fine, the standard of proof adopted reflects the value that society places on the underlying right involved. Cf. Addington v. Texas, 441 U.S. 418, 425 (1979) (discussing the clear and convincing proof standard in the context of the due process clause). The right of free speech and the concern about "the practical impact upon truthful speech"--which is "the whole point of the New York Times case," Oakes, supra, at 701 (quoting T. Emerson, The System of Federal Expression 536 (1970)--obviously are valued highly. We have noted in an earlier case "the almost decisive amplitude of 'breathing space' surrounding defamatory falsehood, once a plaintiff is obliged to meet the New York Times standard," as well as one commentator's conclusion that the rule in

that case "'in practical effect became a near-immunity from defamation judgments.'" Bruno & Stillman, 633 F.2d at 686 (quoting Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1373 (1975)).

The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. See Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 868, 330 N.E.2d 161, 173 (1975). A court typically will infer actual malice from objective facts. Oakes, supra, at 666-67 (quoting Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1965), cert. denied, 385 U.S. 1011 (1967)). These facts

should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is lacking in this case.

It is helpful to compare the research and editing procedures followed by CU in publishing its article on loudspeakers with publishers' procedures that have been examined in other cases. One court, in finding that the plaintiff--a public figure--had failed to show actual malice, reviewed CU's work in publishing a series of articles in 1978 attacking the claims of certain organizations and individuals that fluoridization causes, among other things, cancer and birth defects. Yiamouyiannis v. Consumers Union of the United States, Inc.,

619 F. 2d 932. It stated:

> It is clear that appellee, through its agents, made a thorough investigation of the facts. Scientific writings and authorities in the field were consulted; authoritative scientific bodies speaking for substantial segments of the medical and scientific community were investigated. The unquestioned methodology of the preparation of the article exemplifies the very highest order of responsible journalism: the entire article was checked and rechecked across a spectrum of knowledge and, where necessary, changes were made in the interests of accuracy.

Id. at 940. Although we would refrain from describing CU's loudspeaker article as exemplifying the very highest order of responsible journalism, CU does not have to meet such high standards to prevail. In addition, these two CU projects are distinguishable. In the fluoridization article there existed an abundance of scientific research and writing which CU merely cited

in drawing its conclusions. In the instant case, CU had the much more difficult task of performing the original research.

It is important to point out that in conducting the listening test CU used experts, Seligson and Lefkow,[9] who brought their expertise and experience to bear in evaluating the Bose speakers. In Reliance

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[9] One of the panelists, Seligson, was the senior project engineer on the project. He had a bachelor's degree in electrical engineering and had taken some courses toward a master's degree in electrical engineering. He also had taken another course in acoustics. Seligson had four years of experience with the U.S. Naval Materiel Laboratory, where he devoted much of his time to measuring and evaluating loudspeakers. Except for a two-year stint with another corporation, he has worked for CU since 1961, becoming a senior project engineer in 1963 and the chief of CU's Electronics Division in 1974. The district court noted that as of the time of trial Seligson had more than twenty-five years of experience testing and evaluating loudspeakers. The other panelist, Lefkow, was a

Insurance Co. v. Barron's, 442 F. Supp. 1241 (S.D.N.Y. 1977), the court noted the expertise of the author and granted a motion for summary judgment because there was no triable issue of fact that the article was published with actual malice. Id. at 1350-51. The Second Circuit found lack of expertise to be evidence of malice in Goldwater v. Ginsburg, 414 F.2d 324 (2d Cir. 1969). The court affirmed a jury finding of actual malice in an article stating that Senator Goldwater suffered from the mental disease of paranoia. The court noted that this conclusion "was

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project engineer who had just joined CU prior to the loudspeaker project. He held bachelor's and master's degrees in electrical engineering.

reached only upon his (the author's) own non-expert evaluation of Senator Goldwater's life and political career." Id. at 331.

Some evidence of actual malice may be found "if there is a complete departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Reliance Insurance, 442 F. Supp. at 1341. CU's editorial procedures reveal no evidence of actual malice. As in Reliance Insurance, the testimony in this case indicated that normal editorial procedures were followed; there was no evidence of CU knowingly departing from these procedures in order to publish the article regardless of its truth or falsity. After testing the loudspeakers, Seligson prepared a rough draft of the manuscript, commonly

referred to as a "report to editorial," which was reviewed by an associate technical director. The Editorial Department then reviewed this report and drafted the manuscript for publication. Among other editorial alterations, the Department changed Seligson's words that instruments "suffered (from) a tendency to wander around the room" to the statement ultimately published that instruments "tended to wander about the room." This manuscript was sent back to Seligson for "line by line checking" and then forwarded to the associate technical director for his review. It was then returned to the Editorial Department. These same procedures were applied to galley proofs, second galley proofs, page proofs, and second page proofs. The associate technical director

testified that when he performed his reviews the words "tended to wander about the room" conjured up "the mental image . . . of the sound moving about in front of the listener." He also testified that when he approved the article for publication he never really pondered the meaning of the word "about" in the statement. The most we can conclude from this is that in reviewing the manuscript CU employees could have inquired more painstakingly into the precise language being used.

Even though we accord relatively little weight to CU's claims of good faith and lack of any motivation to disparage the Bose 901, we are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was

false or with reckless disregard of whether it was false or not. The evidence presented merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. CU was guilty of using imprecise language in the article--perhaps resulting from an attempt to produce a readable article for its mass audience. Certainly this does not support an inference of actual malice. See Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 434 (D.C. Cir. 1978); cf. Lambert v. Providence Journal Co., 508 F.2d 656, 659 (1st Cir. 1975) (discussing "the court's reluctance to entertain libel suits dependent upon a precise construction of a newspaper's use of technical legal terminology"); R. Sack, supra, at 175 ("'mere exaggeration, slight irony or wit,

or all of those delightful touches of style that go to make an article readable, do not push beyond the limitations of fair comment'" (quoting Briarcliff Lodge Hotel, Inc., 260 N.Y. 106, 118, 183 N.E. 193, 198 (1932)). To find actual malice in this case would be to interpret that concept to require little more than proof of falsity, an interpretation that Justice Goldberg expressed fears about in his concurrence in New York Times v. Sullivan. 376 U.S. at 298 n.2 (Goldberg, J., concurring).

Due to our holding on the issue of liability, there is no need for us to review the district court's findings on damages.

Reversed.

CAMPBELL, Circuit Judge (concurring).

In joining as I do in the court's opinion,

I wish merely to emphasize my understanding that this court is in no way passing upon the actual merits of the district court's finding that Bose Corporation was a public figure.

Adm. Office, U.S. Courts - Addison C. Getchell & Son, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

BOSE CORPORATION,
Plaintiff

v.

CIVIL ACTION
NO. 71-481-J

CONSUMERS UNION OF U.S., INC.,
Defendant

O P I N I O N
January 21, 1981.

JULIAN, Senior District Judge

The plaintiff, Bose Corporation (Bose), a manufacturer of loudspeaker systems and other audio equipment, brought this civil action in 1971 against the defendant, Consumers Union of United States, Inc. (CU), a consumer product-testing organization, alleging product disparagement, unfair competition, and violation of Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a)(1976). Jurisdiction was based on diversity of citizenship, 28 U.S.C.

Section 1332(a)(1), and on the Lanham Act, 15 U.S.C. Section 1121 and 28 U.S.C. Section 1338(a) and (b). The lawsuit was precipitated by the publication of a review of the plaintiff's product, the Bose 901 Series I loudspeaker system, (the Bose 901), which appeared in the May 1970 issue of the defendant's publication, Consumer Reports.

After an exceedingly protracted period of pretrial discovery[1] the Court severed the issue of damages from the other issues in the case and ordered that a trial be held on the issue of damages only if the plaintiff prevails on the remaining issues. The Court then conducted a non-jury trial which concluded after nineteen days of testimony.[2] This opinion constitutes the Court's findings of fact and conclusions of

law as required by Rule 52 of the Federal Rules of Civil Procedure. Further findings of fact and conclusions of law on the issue of damages will be made after the trial on damages is held.

## THE PARTIES

### Plaintiff

The plaintiff, Bose Corporation (Bose), is a corporation organized under the laws of the State of Delaware and having its principal place of business in Framingham, Massachusetts. It was organized in 1964 under the laws of the Commonwealth of Massachusetts and became a Delaware corporation by merger in December, 1978. When this action was commenced on February 23, 1971, the plaintiff was a Massachusetts corporation and had its principal place of business in Natick, Massachusetts.

Dr. Amar G. Bose (Dr. Bose) is the founder, principal owner, and chief executive officer of the plaintiff corporation. The name of the plaintiff corporation is derived from the surname of Dr. Bose. Dr. Bose is also the inventor of the Bose 901, the product involved in this action.

Dr. Bose received his Bachelor of Science degree and his Master of Science degree from Massachusetts Institute of Technology (M.I.T.) in 1952 and his Doctor of Science degree from the same institution in 1956. He has been a member of the faculty of M.I.T. in the Department of Electrical Engineering since 1956. He is the co-author of a textbook entitled Introductory Network Theory. For the purposes of this action the defendant concedes that he is an expert in the field

of loudspeaker design.

The Bose 901 system was designed by Dr. Bose in 1967. The system consists of two loudspeaker cabinets, an electronic device called an "active equalizer," and necessary wiring and connections. Each of the cabinets is of pentagonal shape when viewed from above, being designed to have one side (the front face) facing toward the listener and two other sides (the rear faces) facing away from the listener. The two rear faces join at an angle in the rear of the cabinet to form a "V". The front face contains a single driver.[3] Each of the two rear faces contains four drivers. The nine drivers are of equal size. Because of this configuration of drivers within the Bose 901 cabinets, each Bose 901 loudspeaker radiates one-ninth of the sound directly

into the listening area, and eight-ninths of the sound into the listening area after reflection off one or more walls. The shape of the Bose 901 cabinets and the design of the Bose 901 system as a whole are unique and unconventional.

The Bose 901 was first marketed in late 1967 or early 1968. In 1968 Bose began to advertise and extensively promote the Bose 901. Bose published advertisements promoting the Bose 901 in the national consumer high fidelity magazines[4], in national general publications[5], and in other publications.

A significant portion of the Bose marketing efforts was directed toward soliciting reviews of the Bose 901 by professional reviewers. Bose obtained the right to reprint such reviews and dis-

tributed reprints of the reviews as part of its promotional campaign.[6]

Defendant

The defendant, Consumers Union of United States, Inc. (CU), is a not-for-profit corporation organized and existing under the laws of the State of New York and having its principal place of business in Mount Vernon, New York. CU was organized in 1935. When this action was commenced, CU had its principal place of business in Mount Vernon, New York.

From May 1936, to date, CU has published a magazine called Consumer Reports, in which information about the quality, characteristics, and prices of various consumer products is set forth. At all times relevant to this action, Consumer Reports has been published on a monthly

basis. Consumer Reports is distributed by mail to subscribers and is sold on newsstands.

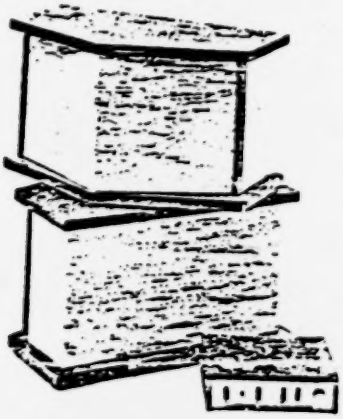
The influence of Consumer Reports on consumers' buying decisions is substantial. During 1970 and 1971 Consumer Reports and CU had a very favorable reputation for independence, integrity, accuracy, and freedom from bias. Subscribers to Consumer Reports tend to make buying decisions relative to consumer products after consulting reports published in Consumer Reports, among other sources, and in 1970 millions of readers relied upon the product information published in the magazine. Many consumers would not think of making a substantial purchase without consulting Consumer Reports.

## The Consumer Reports Article

On pages 272 through 279 of the May 1970 issue of Consumer Reports CU published an article entitled "Loudspeakers" (the Article). The Article contained CU's evaluation of the quality and performance of twenty-four different loudspeakers based on CU's tests of the loudspeakers. In a section (the Bose 901 Portion) boxed off from the main body of the Article, under the heading "Some loudspeakers of special interest," appeared the following comments about the Bose 901:

> Some loudspeakers of special interest
>
> **BOSE 901. No loudspeaker design has ever really captured the realism of live concert hall sound, although many designers have tried. The Bose 901 system (The Bose Corp., Natick, Mass.) takes an interesting shot at realism. The concept behind the Bose system is**

based on the contention that in an actual concert hall most of the sound you hear has been bounced from the walls; it does not come directly from the orchestra. Therefore, the Bose 901 speaker system directs only about 10 per cent of its output toward the listener and bounces the other 90 per cent from the wall. The Bose 901 system comes as a package with two speaker systems and an electronic equalizer that can be easily connected to your amplifier. The package is priced at $476 ($496 on the West Coast).



Each speaker cabinet contains nine small (five-inch), speakers. Small speakers tend to reproduce high frequencies more efficiently than low frequencies. But so many speakers together in each cabinet help to reinforce bass tone, and help to disperse the sound more evenly. The

electronic equalizer is intended to further compensate for the relatively low bass efficiency of small speakers, to compensate for the loss of treble when sound is reflected from the walls, and thus to help provide a uniform overall response. The active equalizer can be adjusted, within limits, to vary the sound to individual taste.

To determine what effect the system has on stereo reproduction, CU's engineers made a special tape, in the anechoic chamber, of a cricket-like noisemaker moving from extreme left to extreme right. We played the tape through the Bose system in our listening room and asked a panel to judge the direction from which the sound appeared to come. For comparison, the panel also listened to the same tape through a pair of ADC 303AX speakers, checkrated in the accompanying report. The panelists were able to locate the sound accurately from both the ADC and Bose systems when they sat directly between the speakers, but not when they sat at either the extreme left or extreme right. So, at least for pinpointing sharp noises, there appeared to be no difference between the speaker systems.

We repeated the experiment using a variety of stereo records. When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of

giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.

But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise they too acquired the same spacial openness and size distortions as the stereo records.

As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality with impressive bass, considering the small speakers. But the combination of the equalizer and the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound.

We think the Bose system is so unusual that a prospective buyer must listen to it and judge it for himself. We would suggest delaying so big an

> investment until you were sure the system would please you after the novelty value had worn off. If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per channel for the deepest bass response.

A brief summary of the Bose 901 Portion of the Article was published by CU in the December 1970 "Buying Guide Issue" of Consumer Reports.[7]

CU Personnel

The testing project that led to the publication of the Article involved a number of CU personnel, but the persons who were primarily responsible for the Bose 901 Portion of the Article were Arnold L. Seligson and Alan Lefkow. Seligson was the senior project engineer on the loudspeaker testing project and Lefkow worked as a project engineer under the immediate supervision of Seligson.

Seligson received a bachelor's degree in electrical engineering from the City College of New York in 1957. He took additional courses leading toward a master's degree in electrical engineering during the years 1953-1956, but discontinued his studies for personal reasons and never attained a master's degree. He also took a course in acoustics at Brooklyn Polytechnic Institute in 1953.

From 1952 to 1956, Seligson worked for the United States Naval Laboratory, where much of his work involved measurement and evaluation of loudspeakers. In July 1956 Seligson was employed by CU as a project engineer. In 1961 he left CU to work for another corporation. He returned to CU in 1963 as a senior project engineer and remained a CU employee to the time of trial.

Seligson became chief of CU's electronics division in 1974 and held that position at the time of trial. While an employee of CU, Seligson has done extensive work on testing of loudspeakers. He has been testing and evaluating loudspeakers for more than 25 years.

Alan Lefkow was first employed by CU at the end of September 1969, just before the loudspeaker testing project began. He was employed as a project engineer in the electronics division and worked on the loudspeaker testing project under Seligson's supervision. Before joining CU Lefkow had received a bachelor's degree in electrical engineering from the City College of New York in 1965 and a master's degree from Columbia University in the same field in 1968.

## CU's Expert Witness

Dr. David M. Green testified as an expert witness for CU. Dr. Green is the Chairman of the Department of Psychology and Social Relations at Harvard University, where he is a professor of psychophysics. He received a bachelor's degree in liberal arts from the University of Chicago in 1952, a bachelor's degree in psychology from the University of Michigan in 1954, and a doctoral degree in psychology from the University of Michigan in 1958. He has taught courses in psychoacoustics at various universities; is the author of a large number of publications in the field of psychoacoustics; has written a text book entitled An Introduction to Hearing; is the president-elect of the Acoustical Society of America; and was acknowledged by the

plaintiff to be an expert in the field of psychoacoustics.[8]

The Loudspeaker Tests

CU's loudspeaker testing project began in the spring of 1969 with the preparation of three marketing reports by CU's Marketing Services Department. These reports were used in selecting the loudspeakers which were to be tested. A total of twenty-four of the loudspeakers listed in the marketing reports were eventually selected for testing.

The primary purpose of the loudspeaker project was the evaluation of medium-priced loudspeakers, generally those with a retail price of from $80 to $150 per speaker. The Bose 901, which consisted of two loudspeaker cabinets and an active equalizer, was priced at $476 and was thus not a

medium-priced loudspeaker system. Nevertheless, Seligson and other CU employees decided to include the Bose 901 in the testing project because of the wide reputation it had achieved in the industry and because of the unusual claims made on its behalf by its manufacturer. Seligson was directly involved in the initial discussions concerning the inclusion of the Bose 901 in the testing project. Seligson also completed a "Test Sample Requisition" to be prepared for the purchase of several loudspeakers, including the Bose 901. The decision to include the Bose 901 in the testing project required the approval of Seligson's superiors -- Karl Nagel, Chief of the Electronics Division; Monte Florman, acting (associate) technical director, and John Hanc, head of the Marketing Services

Department. Seligson expected that the "Test Sample Requisition" which he had prepared would, in the normal course of events, be approved and it was in fact approved by Seligson's superiors.

The loudspeaker tests that provided the basis for the evaluations made in the Article began in September 1969. Seligson was in charge of the testing and planned the tests. He did some of the testing work himself, and supervised the work of Lefkow and two assistant project engineers who were assisting in the testing work. When the testing was completed, Seligson analyzed the results and prepared, with Lefkow's assistance, a report to CU's editorial department which report formed the basis of the Article.

Each of the twenty-four loudspeakers

was put through a basic battery of tests. The loudspeakers were first put through a number of "objective" tests and measurements.[9] They were subjected to an "A-B listening test," a test which was designed to evaluate the "accuracy" of the loudspeakers. The "A-B listening test" was described in the Article as follows:

> To supplement the quantitative measurements we made of the loudspeakers in the anechoic chamber and the listening room, we put each speaker through a carefully designed listening-panel test. We first selected a speaker we knew provided a wide, smooth frequency response; that became the "reference speaker." We played a wide variety of music through that speaker in the anechoic chamber and recorded the output of the speaker on one track of a master tape. At the same time, we recorded the music directly on the second track of the master tape, without playing it through the speaker.
>
> The reference speaker was then set up in the listening room, hidden from view of the listening panel. The music recorded on the second track of the

master tape (that is, the music recorded directly from the source) was played through the reference speaker. The speakers under test were set up two at a time, also out of view of the panelists.

The music recorded from the first track of the master tape (that is, the music recorded from the reference speaker) was played through the speakers under test. Under those conditions, then, a test speaker that reproduced music with absolute fidelity would sound exactly the same as the reference speaker.

The panelists were asked to judge which one of the two test speakers produced a sound that was, overall, closer to that of the reference. (We could, of course, switch back and forth between the reference speaker and the test speakers almost instantaneously.) The listeners were told emphatically not to base their judgments on which speaker seemed "better" for music or which they "liked" better, but merely to say which was more faithful to the reference sound. At the same time, by asking the listeners to match the loudness of the speakers under test, we determined the amount of average sine-wave power required for each speaker to produce the same loud sound in a 3000-cubic-foot room. That figure provided a good comparison of the effective relative efficiency of the speakers.

CU's statistical analysis of the results of the A-B listening test revealed that the Bose 901 should be ranked in the "middle accuracy group" of loudspeakers. Because he felt that the results of this test were unfair to the Bose 901[10], Seligson placed the Bose 901 "between the high- and medium-accuracy groups."

After the objective tests and the A-B listening test were conducted, the Bose 901 was subjected to two additional "special tests."[11] The first "special test," the cricket test, was described in the May 1970 Consumer Reports Article as follows:

> To determine what effect the system has on stereo reproduction, CU's engineers made a special tape, in the anechoic chamber, of a cricket-like noisemaker moving from extreme left to extreme right. We played the tape through the Bose system in our listening room and asked a panel to judge the direction from which the

> sound appeared to come. For comparison, the panel also listened to the same tape through a pair of ADC 303AX speakers, check-rated in the accompanying report.

It was Seligson's idea to conduct the cricket test and it was Seligson who designated the Bose 901 for inclusion in the cricket test.[12]

The second "special test," the "special listening test," was also Seligson's idea. The "special listening test" consisted simply of Seligson and Lefkow recording their personal observations after listening for several hours to a variety of records played through the Bose 901. Seligson selected himself and Lefkow to be the "panelists" for the "special listening test" because he felt they would be the appropriate parties to make the subjective judgments that were called for by this test.

## The Seligson Patent

In the summer of 1964, Seligson conceived of an idea for utilizing an electrical discharge in order to produce sound. He envisioned the primary application of his idea to be a device which could be used as a loudspeaker.[13] In the fall of 1964 Seligson and Robert S. Lanier, a fellow CU employee, began work on the development of a loudspeaker using Seligson's idea. They built several models of the loudspeaker and discovered that the concept worked. Their models produced audible sound. The sound, however, was produced at very low levels, was distorted, and was accompanied by the production of ozone when the models were in operation.

In late 1964, Seligson and Lanier decided to attempt to obtain a patent on

the new loudspeaker and retained a patent attorney named Robert W. Fiddler for that purpose. They called their invention the "Ionoflow Loudspeaker," and in describing it to Fiddler, Seligson wrote:

> "Above all, the Ionoflow can, we believe, be made into the first truly full-range, high efficiency, low-distortion speaker in a fairly (sic) small form."[14]

Seligson believed that language to be an accurate description of the invention at the time.

An application for a patent on the invention was signed by Seligson and Lanier on April 8, 1966, and filed in the United States Patent Office on April 26, 1966. At that time Seligson still thought that his invention might have commercial potential despite its problems of inadequate sound volume, distortion, and ozone production.

Seligson did not work on the invention at all from 1967 until spring of 1970. He was discouraged by the problems encountered in building a good, working model and became gradually disillusioned about the prospects of future commercial exploitation of his idea.

On May 5, 1969, Fiddler wrote to Seligson to inform him that notice had been received from the United States Patent Office that a patent would issue on the application. On November 4, 1969, during the same period of time CU was conducting its loudspeaker tests, United States Patent No. 3,476,887 was issued to Seligson and Lanier for their "Ionic Electro-Acoustic Transducer."

In April 1970 Seligson learned that Lanier had been approached by a man named

Bertram Menden, who sought on behalf of a third party to acquire a license or rights under the patent. Menden was in reality a private detective retained by Bose to inquire into matters relating to the patent. Seligson obtained permission from Florman to enter into an agreement with Menden and then signed such an agreement (the Menden Agreement). He understood that the Menden Agreement granted to Menden or his undisclosed principal a right of first refusal for a license under the patent. Menden then paid $2,000 to Seligson and Lanier, which, under the terms of the Menden Agreement, was to be used only for the purpose of building a model of the invention. When Seligson and Lanier accepted the payment of $2,000, Seligson intended to build a model of the invention for Menden, and he

and Lanier worked hard to do so. Seligson understood that if the model were satisfactory, Menden might seek a license under the patent. Despite their hard work, Seligson and Lanier were unable to complete a model because they ran out of funds prior to completion of the amplifier and power supply, an essential part of the device.

Report to Editorial

Around the end of January 1970, after completion of the loudspeaker testing, Seligson and Lefkow prepared a draft "Report to Editorial" for use by the editorial department in preparing a manuscript of the Article. The portions of the "Report to Editorial" which dealt with the Bose 901 were drafted entirely by Seligson.[15] After review by Seligson's superiors the draft was forwarded to the editorial

department. The Bose 901 Portion of the Article was based on the material written by Seligson in the "Report to Editorial."

Product Disparagement

The complaint in this case alleges a claim for relief for product disparagement.[16] In cases such as this, where the plaintiff is a corporation, product disparagement is sometimes confused with the closely related tort of corporate defamation. Conceptually the two torts are easily distinguishable. Defamation of a corporation injures the reputation of the corporation itself, while product disparagement injures the reputation of its products. Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902).[17] In practice, however, the line

between the two torts is often blurred because comments that disparage a product almost invariably reflect adversely on the manufacturer of the product as well. Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); W. Prosser, Law of Torts Section 128, at 918 (4th ed. 1971).

The distinction between the two torts must be drawn because there are important differences in their required elements of proof. Both torts require proof of the publication and of the disparaging or defamatory nature of the statements involved. W. Prosser, Law of Torts Section 128, at 920 (4th ed. 1971). In an action for product disparagement, however, a plaintiff must prove that the offending statements are false, Swan v. Tappan, 59 Mass. 104 (1850); Marlin Firearms Co. v.

Shields, 171 N.Y. 384, 64 N.E. 163 (1902), whereas in an action for corporate defamation, falsity is presumed and truth is a defense which must be proven by the defendant. Restatement (Second) of Torts Section 581A, Comment b (1977). In addition, if the action is for product disparagement, the plaintiff must allege and prove special damages -- specific proof of pecuniary loss -- before being entitled to recover. Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902). Until recently,[18] at least, damages were presumed in an action for corporate defamation. Restatement (Second) of Torts Section 569 (1977).

It follows that because this is an action for product disparagement, the

burden is on the plaintiff to prove that the statements made by CU were false and to prove the existence and amount of special damages. The Court severed the issue of damages from the other issues in this case, but not before the plaintiff made a minimal showing that it could produce evidence of special damages.

CU urges that, before dissecting each statement contained in the Bose Portion of the Article, the Court should read the entire Article. According to CU, the Article, when read as a whole, is not disparaging at all, but complimentary to the Bose 901. The Court does not accept this characterization. The Article contains some statements that might be interpreted as complimentary,[19] but the effect of that language is more than

outweighed by other statements that are clearly critical[20] of the Bose 901. The Court concludes that the Article, when read as a whole, is disparaging.

The plaintiff claims that there are numerous factual errors in the Bose 901 Portion of the Article. In the following paragraphs each of the alleged factual errors will be discussed in turn, with regard to whether the statement is in fact false and with regard to whether the statement is disparaging.

"Panels"

The words "panel" and "panelists" appear throughout the Article, especially in the Bose 901 Portion. The Article does not explain, however, that there were in fact three different panels involved in testing the loudspeakers -- the "A-B

listening test" involved a panel of five CU employees, the "cricket test" utilized a panel of two CU employees, and the "special listening test" involved only Seligson and Lefkow. The plaintiff claims that CU's use of the words "panel" and "panelists" without explaining that three different panels were involved was misleading. It was also misleading, according to the plaintiff, for CU to use the word "panel" when referring to only two people. Seligson himself testified that the use of the word "panel" to describe two persons could be "possibly a mite misleading." Tr. 9-89.

While the Court agrees that CU's use of the words "panel" and "panelists" was misleading to the readers of the Article, it is difficult to see what harm such misleading use of terms caused the plaintiff.

The misleading use of the words "panel" and "panelists" simply does not disparage the Bose 901.

Equalizer Function

The Bose 901 Portion of the Article said the following with regard to the Bose 901 active equalizer:

> The electronic equalizer is intended to further compensate for the relatively low bass efficiency of small speakers, to compensate for the loss of treble when sound is reflected from the walls, and thus to help provide a uniform overall response. The active equalizer can be adjusted, within limit, to vary the sound to individual taste.

At trial the plaintiff contended that this statement was false. However, the plaintiff has represented that it no longer relies upon this asserted factual error as a basis for relief in this action[21] and the Court will disregard it.

## Sound Quality

The following statement was made in the Bose 901 Portion of the Article:

> As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups.

The main body of the Article states:

> Over the years, CU has constantly refined its testing methods and examined repeatedly the relationship between measurable factors and listeners' judgments on quality. From such studies, we arrived at two conclusions. First, loudspeaker quality, as the listener finds it, can be measured in the lab, but only roughly--to divide speakers into broad quality groups of the kind used in our Ratings.

The plaintiff reads the two foregoing statements as implying that the Bose 901 had been subjected to careful, objective tests and measurements which had resulted in its being ranked below the "High Accuracy" loudspeakers. According to the

plaintiff, none of the tests that were performed on the loudspeakers to determine their accuracy were objective at all, and, even if they could be considered objective, they were not performed on the Bose 901. Thus, the plaintiff contends, CU misled its readers into thinking that the sound quality of the tested loudspeakers, including the Bose 901, had been carefully and objectively measured and that the sound quality of the Bose 901 had been found lacking in some respects. The facts giving rise to the plaintiff's claim are as follows.

The "accuracy" ratings were derived in part from the "objective tests" that were performed on the loudspeakers. A "roughness index," a "spectrum index," and a "low frequency index"[22] were determined for

each of the conventional loudspeakers.[23] These three indices were then multiplied together to determine a score for each loudspeaker. After a score was determined for each loudspeaker, Seligson applied his own subjective judgment to alter the scores because he felt "the objective scores did not reflect the true standing." Tr. 10-127. The final rankings of the conventional loudspeakers which appeared in the Article reflect the scores as altered by Seligson.

The Bose 901 and the Harman-Kardon HK-50 loudspeakers were never scored in this fashion because they were unconventional loudspeakers. The technique for evaluating the objective data generated by such unconventional loudspeakers was beyond CU's capabilities at the time. Therefore, none of the three indices was determined

for the unconventional loudspeaker. Nevertheless, the Article made the following statements about the unconventional loudspeakers.

> As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups.
>
> Our judgment of the overall sound quality of the Harman-Kardon HK50 would place it in the lower section of the medium-accuracy group. Its sound was distinctly hollow and muddy.

The Court agrees with the plaintiff that the Article implies that the accuracy of the tested loudspeakers was determined in an objective fashion. CU's statement that "(l)oudspeaker quality . . . can be measured in the lab . . . ," creates the impression that such measurements made in a laboratory are objective ones, rather than the type of subjective judgments made by

Seligson. The Court also agrees that the foregoing implication was false. The fact that objective scores were determined is of little consequence in view of the fact that Seligson subsequently altered those objective scores to conform to his subjective judgments. In addition to the fact that the tests that were performed on the conventional loudspeakers lacked objectivity, no objective scores at all were determined for the Bose 901 or for the HK-50 loudspeaker.

Standing by itself, however, the false implication that the accuracy of the tested loudspeakers was determined in an objective manner does not entitle the plaintiff to relief, because it is not disparaging. The statement that the plaintiff really disputes is CU's rating of the Bose 901 as

"between the high- and medium-accuracy groups." The allegedly harmful effect of that statement could, of course, be exacerbated by the false implication that the accuracy of the loudspeakers was determined in an objective manner. Nevertheless, the false implication that the accuracy of the tested loudspeakers was determined in an objective manner, taken alone, does not reflect adversely on the Bose 901 and is thus not disparaging.

The plaintiff also argues that because no objective score was determined for the Bose 901, it was impossible for CU to have rated the Bose 901 "with the main group of tested speakers." Thus, CU's statement that "if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-

accuracy groups" must have been false. The plaintiff's argument, however, presumes that the only way in which a loudspeaker could be rated "with the main group of tested speakers" would be if an objective score had first been determined for that loudspeaker. In reality, however, the objective scores obtained in the tests were irrelevant for purposes of the ratings because the objective scores were subsequently adjusted by Seligson to conform to his subjective assessments. Seligson's adjustments caused the entire rating process to be subjective. Therefore, no objective score was needed in order to rate the loudspeakers and CU's failure to perform objective tests on the Bose 901 would not preclude CU's rating of the Bose 901 "with the main group of tested speakers."

With regard to the "sound quality" or "accuracy" of the Bose 901, the crux of the dispute between the parties is CU's rating of the Bose 901 as "between the high- and medium-accuracy groups." The plaintiff contends that the Bose 901 should have been rated in the high accuracy group. The problem with the plaintiff's position is that all experts who testified in the case, including Dr. Bose, agreed that the evaluation of any loudspeaker's "sound quality" or "accuracy" is a subjective matter. In the final analysis it is nothing more than an opinion and, as such, it cannot be proved to be true or false. As the Supreme Court said in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may

seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Power Requirements

CU rated the tested loudspeakers in the Article with regard to a number of characteristics, including amplifier power.[24] In its amplifier power ratings CU stated a figure in watts for each of the rated loudspeakers, ranging from a high of 27 watts for the Dynaco A25 to a low of four watts for the Yamaha NS15, explaining that:

> The power figure (in watts) is the minimum average sine-wave amplifier power found to be required to produce a loud sound in a listening room of about 3000 cu. ft. with "average" acoustics:

Seligson testified that the "loud sound" referred to in the Article was approximately 85dB[25] on average, with momentary peaks as high as 93-94dB. Tr. 11-27.

The Dynaco A25 was the only loudspeaker rated by CU in the Article as requiring more than 15 watts of amplifier power. Thirteen of the nineteen rated loudspeakers were described as requiring less than 10 watts of amplifier power. PX-7, pp. 277-278. The Article also stated that the power requirement of a loudspeaker was "an important factor" to be considered in choosing a loudspeaker. PX-7, p. 273, column 2.

With respect to the power requirements of the Bose 901, the Article stated:

> If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per channel for the deepest bass response.[26]

The parties seem to agree that the average reader would read the above-quoted statement in the context of the entire

Article and would therefore infer that the recommended 50 watts of amplifier power was necessary for the Bose 901 to produce the deepest bass sounds at "loud" volume levels. PRFOF p. 113, DRFOF p. 25-26 (Emphasis added). The plaintiff argues that the readers of the Article would interpret CU's statement as meaning "that the Bose 901 required more amplifier power than any of the other speakers tested by CU, and that a user would require an amplifier having a power of 50 watts per channel to produce the deepest bass sounds from the Bose 901 at loud levels, whereas the other loudspeakers tested would require only a small fraction of that power." PRFOF p. 113 (Citations omitted). According to the plaintiff, CU's statement, so interpreted, is false because the Bose 901 does not

require more power than the other rated loudspeakers to produce the deepest bass sounds at loud volume levels. The plaintiff also contends that the statement is disparaging because at the time of the Article's publication very few consumers had amplifiers of 50 watts per channel or more. Therefore, in the plaintiff's view, for the majority of consumers at that time, the Article's recommendation was tantamount to advice not to buy the Bose 901.

The Court has carefully considered all the evidence introduced by the parties on the issue of the power requirements of the Bose 901. The record with respect to this issue is replete with irreconcilably contradictory statements and evidence of questionable trustworthiness. It is difficult to understand why the record should

be so muddled with respect to an issue such as the power requirements of the Bose 901, which both parties concede can be easily measured with the use of an oscilloscope. All that was necessary was a measurement of the power required by the Bose 901 under the same conditions as those used by CU in its original tests, yet neither party performed such a measurement.[27] On the basis of the present record the matter is still entirely within the realm of speculation. Accordingly, the Court rules that the plaintiff has not sustained its burden of proving by a preponderance of the evidence that the defendant's statements -- "If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per chan-

nel for the deepest bass response." -- were false.

Size and Movement

The bulk of the testimony at trial concerned the following statements which were made in the Bose 901 Portion of the Article:

> But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same spacial openness and size distortions as the stereo records.[28]

Before discussing the size and movement of "individual instruments" it is necessary to define some terms which will be used in the following sections of this opinion. One characteristic of stereo loudspeaker systems is that when a listener is situated in the "ideal listening position," equidistant from two loudspeakers, and the same sound emanates from the two loudspeakers simultaneously, the listener perceives the source of the sound not as either or both of the two actual loudspeakers but as a "phantom" or "apparent" source located somewhere between the two loudspeakers. There was a great deal of confusion in the terminology used at trial[29] because there are no consistent, widely accepted terms used to describe this phenomenon.[30] In this opinion the Court will use the words

"apparent sound source" to describe the area located somewhere between two loudspeakers which the listener perceives to be the source of the sound arriving at his ears. Except when quoting the Article the Court will use the word "instrument" to refer to the musical instrument that originally produced music that is later reproduced by a stereo system.

Size

The testimony at trial concerning the statement about "instruments" which "seemed to grow to gigantic proportions" was confusing at times because the parties approached the issue from different viewpoints. The plaintiff reasoned that the average reader would interpret the above-quoted statement as meaning that the "panelists" actually perceived that the physical dimensions of

the musical instruments whose sound was being reproduced had grown. Therefore, in an attempt to establish the falsity and disparaging nature of the statement, the plaintiff produced evidence that tended to show that a person listening to the Bose 901 could not possibly perceive that the physical dimensions of a musical instrument heard through the Bose 901 had grown. The defendant, on the other hand, concluded that the statement would be interpreted by the reader to mean that the apparent sound source of a particular instrument whose sound was being reproduced on the Bose 901 had become gigantic. Accordingly, in order to prove the truth of its statement, the defendant introduced evidence tending to show that it is indeed possible for a listener to perceive that the apparent sound

source of an instrument played through the Bose 901 had become quite large.

Because of the different approaches taken by the parties on this issue, the actual meaning of the words used becomes critical. Since this is a non-jury case it is the Court's obligation to determine not only whether the above-quoted statement is susceptible of the meanings suggested by the parties, but also how the statement was in fact reasonably interpreted by readers of the Article. In making these determinations the Court must construe the words used in their natural sense, as persons generally understand them. Cafferty v. Southern Tier Publishing Co., 226 N.Y. 87, 93, 123 N.E. 76, 78 (1919); Lyman v. New England Newspaper Publishing Co., 286 Mass. 258, 260, 190 N.E. 542, 543 (1934).

There is no evidence in the case that suggests that the words used would have any unusual meaning to any particular group, such as audiophiles,[31] who might have more interest in the Article than the general public.

The Court finds that the words used -- "Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall." -- are susceptible of both of the interpretations suggested by the parties. The words could mean that the panelists perceived that the physical dimensions of the instruments themselves had grown; they could also mean that the panelists perceived that the

apparent sound source had grown. The Court further finds, however, that the interpretation suggested by the plaintiff -- that the panelists perceived that the physical dimensions of the instruments themselves had grown -- is not a reasonable one and that the readers of the Article did not so interpret the above-quoted statement.

In making the foregoing determination the Court relies not only on its own reading of the words of the Article, but also on the testimony of Dr. Bose, which the plaintiff offered at trial to show the falsity of the statements in the Article. Dr. Bose testified at length about the phenomenon that no one, when listening to a stereo loudspeaker system, could possibly conclude that the instruments that originally generated the sound that was being

reproduced by the loudspeakers had grown to gigantic proportions. Common sense supports Dr. Bose's conclusion. To the Court's knowledge, no one has ever heard a 10-foot violin or a wall-to wall piano being played, and it would be difficult for a listener to imagine the sound produced by something totally foreign to his experience. It would be impossible to conclude that a reader would interpret the words of the Article in such an absurd manner.

The Court thus concludes that the statement in the Article about "instruments" which "seemed to grow to gigantic proportions" was interpreted by the readers of the Article to mean that the apparent sound source had become gigantic. The next question for determination is whether the statement is false even with that meaning

impressed upon it.

The defendant's witnesses testified that one peculiar characteristic of the Bose 901 is that orchestral music played through the system has a diffuse quality -- it seems to be coming from the entire wall behind the loudspeakers rather than from a discrete area along the wall or from the loudspeakers themselves.[32] According to Seligson and Lefkow, however, a different effect is produced when a recording of a solo instrument is played on the Bose 901. Seligson and Lefkow agreed that what they observed during the "special listening test" was that individual notes produced by an instrument seemed to emanate from various points along the wall of the listening room, the location of those points varying with the frequency of the note being played.

Seligson described his observations by using an analogy to the sense of sight:

> As best as I could describe it, it would be that -- if you can imagine peering at an array of lights from a distance so when you view them they seem like a blur of lights somewhere in front of you; and in this array of lights there may be individual lights which twinkle more strongly and focus one's attention upon them, but the twinkling shifts from point to point so that one's attention is drawn first to one spot, then to another, but it would be difficult to see whether at those times when one's attention shifts to a bright spot, whether one has suppressed

the fact that there is a broad light source behind.

This is something that occurs with time and it is a perception. It is difficult to recall precisely the manner in which I heard it, but that is about the best analogy that I could give you. Tr. 10-21.

With the violin wide, the impression is one predominantly of sound coming at you from roughly the entire area in front of you.

In other words, roughly from in front of the entire area. But individual notes, however, may occasionally seem to focus a little better in one location than in another and give the impression

that that is where the violin is for that moment.

And it is a shifting impression. Tr. 10-19.

Lefkow described his observations as follows:

Yes, the piano seemed very wide in the sense that you could hear the various tones from the piano come in at many points right across the front of the room. And the violin, as the violin is played, the violin -- the source of the notes seemed to change as he played different notes. As he went up and down the scale, I heard the notes coming from different points, spread out between the two speakers. Tr. 12-157.

The defendant's expert, Dr. Green, testified that:

> I have heard things (through the Bose 901) that I would describe as, first of all, as very broad image. There is no question about that. Secondly, the source is hard to localize. It's vague, and from moment to moment changes its location. So you might, especially on solo instruments, the apparent source moves from time to time. It could be located in any number of places in front of you. Tr. 14-110.

As noted above, supra at p. 20, the plaintiff concentrated its efforts on proving that a person listening to music

being played over the Bose 901 could not possibly perceive that the physical dimensions of the musical instruments which originally produced the music had grown in size. Therefore, the plaintiff did not present any evidence to contradict the defendant's evidence which tended to show that when listening to the Bose 901 a listener could and does perceive that the apparent sound source is very large. Thus, the court concludes that the plaintiff has not sustained its burden of proof by a preponderance of the evidence that the defendant's statement -- "instruments . . . seemed to grow to gigantic proportions" -- was false.

Movement

The Article states that CU's panel, Seligson and Lefkow in this instance, heard individual instruments that "tended to

wander about the room" (Emphasis added). At trial, however, both Seligson and Lefkow testified that the wandering sounds that they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed.[33] While conceding that the phrase "about the room" "may not be a literally accurate modifier of the verb 'wander'," the defendant argues that the consumer would only be interested in the phenomenon of wandering instruments, not in the locations to which they wandered. Thus, according to the defendant, its statement was "substantially accurate" because it accurately reported the critical observation -- instruments that tended to wander.

The Court does not accept the defendant's characterization of its statement as being "substantially accurate" because,

contrary to the defendant's assertion, the evidence indicates that the location of the alleged wandering would indeed be important to consumers. The testimony at trial showed that a certain degree of movement of the location of the apparent sound source is to be expected with all stereo loudspeaker systems. Such movement is a natural consequence of the stereo recording process and is due to the various polar radiation patterns[34] produced by an instrument at various frequencies. Because such movement between two loudspeakers is a common effect and is to be expected, a reader would not be surprised to read about "instruments" moving along the wall between two loudspeakers. Movement throughout the other areas of the room, however, is not to be expected. Such a bizarre effect is contrary

to what the average listener has become accustomed and would probably be found objectionable by most listeners. The Court concludes, then, that the location of the movement of the apparent sound source is just as critical to a reader as the fact that movement occurred, and that the defendant's statement is not substantially accurate simply because it reported accurately that "instruments . . . tended to wander . . .".

The defendant claims that its statement about wandering "instruments" must be read as modified by the following sentence, which reads: "For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall." According to the defendant this sentence localized the wandering "instruments" along the wall between the

two loudspeakers. The court concludes that no reasonable reader would read these sentences as CU urges. The second sentence gives examples which could only be read by a reader as referrring to the size of the "instruments," not to their location.

The Court also finds that the average reader would interpret the word "about" in its plain ordinary meaning. Florman agreed that the word "about" in this context means the same thing as "around". Tr. 12-117, 118. In fact, Seligson's initial draft contained the words "around the room," rather than "about the room." PX-10, at p. 29.

The absence of similar observations by other listeners, both untrained and professional, tends to support the conclusion that Seligson and Lefkow did not hear "instruments" that "tended to wander about the

room." If the Bose 901 actually produced such unusual auditory effects it would be natural to assume that Bose 901 owners would complain to Bose about them. Yet Dr. Bose testified that to his knowledge no Bose 901 purchaser had ever complained to Bose about the Bose 901 causing "instruments" to appear to wander about the room. In addition, none of the reviews of the Bose 901 that were reprinted by Bose (DX-A) contain a statement that could be construed as referring to wandering "instruments." On the contrary, one of the reviews (DX-A p. 13), published in Stereo & HiFi Times, contains the following statement, which seems to directly contradict CU's comment about "instruments" that "tended to wander about the room":

A multi-directional speaker seems to

> have its sound escape from its box. The source of the sound becomes an area of space above and behind the actual enclosure. This is created beautifully by these speakers. A stereo pair fills the wall with stereo, yet each instrument has its prescribed space - and it stays there. You can spread these speakers much wider apart than conventional boxes without creating a "hole-in-the-middle" effect. DX-A, p. 13 (Emphasis added).

Based on the foregoing analysis, the Court finds that the statement in the May 1970 Article that "individual instruments heard through the Bose system . . . tended to wander about the room" is false. The Court also finds that the statement is disparaging. A statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product.[35] That such a harmful effect was intended is

demonstrated by the use of the word "worse" to introduce the sentence. Use of the word "worse" obviously indicates that what preceded was a deficiency but what followed would be an even greater deficiency in the product.

Dr. Bose, who attempted to combat the perceived negative effects of the Article by visiting and talking with his dealers testified that with respect to the comments contained in the Article the most frequent complaints that he heard from dealers and consumers concerned "The enlarged and wandering instruments and the statement about gigantic power required." Tr. 2-144. Thus, the false statement that "individual instruments heard through the Bose system . . . tended to wander about the room" cannot be considered a de minimis violation of

the plaintiff's rights.

In summary, The Court has ruled that with respect to one statement made in the Article -- "individual instruments heard through the Bose system . . . tended to wander about the room" -- the plaintiff has sustained its burden of proving by a preponderance of the evidence that the statement was both false and disparaging. With respect to each of the other statements contained in the Article the Court has ruled that the plaintiff has failed to sustain that burden in some respect.

Because the Court has ruled that at least one statement contained in the Article was both false and disparaging, the remaining question for determination is whether the defendant observed the required standard of care in making that statement. Before

making that determination, however, the Court must first assess the impact of the Supreme Court's First Amendment decisions on the standard of care required of the defendant.

First Amendment Issues

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court first announced the federal rule under the First Amendment "that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80. Under the New York Times rule, actual malice must be shown with "convincing clarity" rather than by a mere

preponderance of the evidence.[36] Id. at 285-86.

The Court extended the scope of the New York Times privilege in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), by holding that the constitutional privilege applies to defamatory statements about public figures as well as about public officials. The New York Times privilege was then given its most expansive reading in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), where a three-member plurality of the court held that the privilege could also be asserted against a private individual involved "in an event of public or general concern." Id. at 52. Under Rosenbloom the focus was no longer on the status of the plaintiff, but on the newsworthiness of the events involved.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court rejected the Rosenbloom "public interest" test and reverted to a status based test. The Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," Id. at 347 (Citation omitted). Thus, under Gertz, a plaintiff who is neither a public official nor a public figure is no longer required to prove that a defamatory statement was made with "actual malice."

Predictably, the defendant asserts the New York Times constitutional privilege as a defense to this action. The facts of the present case, however, raise some issues

under the New York Times standard which are at present unsettled. For example, the two following questions must be confronted.

1) Does the New York Times actual malice standard apply to product disparagement cases as well as to personal defamation actions?

2) Can a corporation become a public figure and, if so, how?

The Court's resolution of the foregoing questions will determine whether the actual malice standard applies in this case. The Court must then determine whether the plaintiff has sustained its burden of proof under the applicable standard.

Does the actual malice standard apply to product disparagement cases?

All the Supreme Court cases to date which have applied the New York Times

standard have been personal defamation actions rather than product disparagement cases or cases involving defamation of a corporation. Lower court decisions, however, seem to suggest that the actual malice standard should not be limited to personal defamation actions.

A case in point is Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, (3d Cir. 1980). In Steaks Unlimited a television station broadcast a report by its consumer affairs editor which deprecated the quality of the meat being sold by an out-of-state corporation at several local department stores. Because the report was also critical of the corporation's business practices, the corporation brought suit for defamation rather than product disparagement. The court held that, because the

corporation was a public figure under Gertz, the actual malice standard was applicable.

In F & J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F. Supp. 292 (N.D. Ohio 1974), the court reached a similar result, although it should be noted that the court was applying the Rosenbloom "public interest" standard. In F & J Enterprises the plaintiff claimed that the defendants broadcast and published disparaging statements about the plaintiff's product, "Krazy Straw." Once again, as in Steaks Unlimited, supra, the case seems to have been treated as a corporate defamation case rather than a product disparagement action. The Court, after determining that the statement concerned a matter of public interest, held that the actual malice standard applied.

Neither Steaks Unlimited nor F & J Enterprises specifically addressed whether the actual malice standard applies in cases of product disparagement because both cases were treated as corporate defamation actions. Nevertheless, by applying the actual malice standard in cases involving corporate defamation, Steaks Unlimited and F & J Enterprises suggest that the actual malice standard is not limited to personal defamation actions.

An analysis of the Supreme Court's reasoning in New York Times also leads to the conclusion that the actual malice standard should not be limited to personal defamation actions. In the New York Times line of cases the Supreme Court has attempted to strike a balance between the need for a vigorous and uninhibited press and the

legitimate state interest in compensating individuals for wrongful injury to reputation.

The nature of the balancing process changes significantly in product disparagement cases because different interests are being weighed. In a personal defamation action one of the competing interests being balanced is an individual's interest in the protection of his reputation, which, according to Mr. Justice Stewart "reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion). On the other hand, in this product disparagement action we are concerned with a manufacturer's interest in the reputation

of its product, an interest not nearly as significant as an individual's interest in his personal reputation and hardly "at the root of any decent system of ordered liberty." Damage to a product's reputation, unlike damage to the reputation of an individual, can always be measured in terms of monetary loss. Moreover, a manufacturer almost always has access to the channels of communication that can be used to refute disparaging comments about its product.

On the other side of the scale in this balancing process is the consumer's interest in obtaining information about the quality and characteristics of consumer products. The public's interest in obtaining information of this type is perhaps even greater than the corresponding interest in personal defamation actions, the interest in obtain-

ing information about other people. Information obtained from product commentators often relates to health or safety problems in consumer products. See e.g., United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969); F & J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F. Supp. 292 (N.D. Ohio 1974). It would be unfortunate indeed if the threat of product disparagement actions stifled the free flow of such information.

On balance, the Court concludes that the factors underlying the New York Times privilege militate perhaps even more strongly in favor of the application of the actual malice standard in product disparagement cases than they do in personal defamation

actions. Accordingly, the Court rules that the New York Times actual malice standard is applicable in this product disparagement case, provided, of course, that the plaintiff is a public figure for first Amendment purposes.

Can a corporation become a public figure and, if so, how?

Under Gertz only a plaintiff who is a public official or public figure is required to prove that disparaging statements were made with actual malice. The difficulty in this case is that the plaintiff is a corporation and because the Supreme Court cases in this area have dealt only with personal defamation, no standards have been developed by the Supreme Court for use in determining whether a corporation is a public figure. In the personal defamation area Gertz iden-

tified several categories of public figures:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. 418 U.S. at 345.

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy, and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. 418 U.S. at 351.

This case involves the category specified in Gertz which is composed of plaintiffs who "have thrust themselves to the forefront of particular public controversies," 418 U.S. at 345, and have thereby become public figures for a limited range of issues.

Various courts have struggled with the application of Gertz and other relevant Supreme Court cases in determining whether a corporation is a public figure for First Amendment purposes, but their conclusions have not been uniform.[37] Of the cases that have considered the issue thus far, Bruno & Stillman, Inc. v. Globe Newspaper Co., Nos. 80-1172 and 80-1173 (1st Cir. October 17, 1980), sets out perhaps the most reasoned and coherent analysis of the corporate public figure issue.

In Bruno & Stillman the plaintiff corporation, a manufacturer of commercial fishing boats, brought suit against the defendant newspaper company, alleging that the defendant published a series of libelous newspaper articles about the plaintiff. The defendant moved to dismiss, contending that the plaintiff, as a public figure, was required to comply with the stringent requirements of New York Times. The district court ruled that "corporations should be treated as public figures" and accordingly granted the defendant's motion to dismiss the Count of the Complaint which was based on mere negligence. Bruno & Stillman, supra, slip op. at 4. The plaintiff's appeal followed. The first step in the Court of Appeals' analysis was to identify which of the class-

es of public figures that were delineated in Gertz was relevant for the purposes of the case before it. In Bruno & Stillman, as in this case, the relevant class was constituted of persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," Gertz, supra, 418 U.S. at 345, and therefore are public figures for a limited range of issues.

The Court of Appeals next reviewed the applicable Supreme Court cases and concluded that "the detailed, fact-sensitive nature of the precedent indicates that particularized determinations of public figure status are the rule." Bruno & Stillman, supra, slip op. at 11. Therefore, the court re-

jected the district court's conclusion that all corporations are public figures, stating that "We recognize the attraction of broad and clearcut definitions in terms of simplifying litigation, but we cannot see how corporations as a class can be said to be 'public figures' for first Amendment purposes." Id. at 11.

The court then proceeded to utilize the following two-step analysis in its particularized examination of the facts of the case. First, the court determined whether a public controversy existed, and, if so, whether it preceded the alleged defamation. The facts in Bruno & Stillman disclosed no public controversy antedating the allegedly defamatory articles. Second, the court followed the recommendation in Gertz that "It is preferable to reduce the public-

figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Gertz, supra, 418 U.S. at 352. The court therefore examined the facts of the case relating to the "nature and extent" of the plaintiff's activity in the controversy in question. On the basis of the record before it the court concluded that there was insufficient evidence that the plaintiff had thrust itself into the vortex of a public controversy and thus rendered itself a public figure. Consequently, the court held that the motion to dismiss was improperly granted and remanded the case for further development of the record with respect to the public figure issue.

The Court has already determined, supra, p. 32, that the present action is a "thrusting into the vortex" case, Bruno & Stillman, supra, slip op. at 16, and thus merits the particularized approach outlined in Bruno & Stillman. The first question for determination, then, under Bruno & Stillman, is whether a public controversy preceded the publication of the allegedly disparaging comments about the Bose 901. The Court finds the relevant facts to be as follows.

The design of the Bose 901 was a radical departure from the design of conventional loudspeakers. With its emergence on the market in 1968 the Bose 901 introduced several new and unique design concepts, including the use of an active equalizer, the use of both direct and reflected sound, and the use of nine identical drivers. A great

deal of publicity attended the introduction of the Bose 901. As part of its promotional efforts, Bose published advertisements that stressed the principles of operation of the Bose 901, its unconventionality, the research underlying it, its unique appearance, and its quality. Bose not only advertised extensively in national publications to promote the Bose 901, but also actively solicited reviews of the Bose 901 by responsible reviewers so that its unique qualities would be brought to the attention of consumers. By May 1970 Bose had succeeded in having reviews of the Bose 901 published in several magazines and had spent over $100,000 in 1969 alone to advertise the Bose 901.[38]

By creating a new design for the Bose 901 and then emphasizing that unique design

in its extensive promotional campaign, the plaintiff precipitated discussion about the relative merits of the Bose 901 and other loudspeaker systems. Because other loudspeaker manufacturers and reviewers for nationally published magazines were involved, the "controversy" was necessarily public rather than private. Thus, this case presents a situation where "persons actually were discussing some specific question" -- the relative merits of the Bose 901 and conventional loudspeaker systems -- and "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297, cert. denied, ___U.S.___, 49 U.S.L.W. 3270 (Oct. 14, 1980)(No. 79-2064)

(footnote omitted). It is not a case where the defendant attempted to "create (its) own defense by making the claimant a public figure." Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979). The defendant, by its publication of the Article, did not create the public controversy. It simply added its voice to the chorus that was already discussing the merits of various loudspeaker systems. Thus, in the present case there was a "public controversy" that preceded the publication of the allegedly disparaging remarks.

The second part of the Bruno & Stillman analysis is to determine "the nature and extent of (the plaintiff's) participation in the particular controversy giving rise to the defamation." Gertz, supra, 418

U.S. at 352. In this case the plaintiff's participation in the "controversy" over the relative merits of the Bose 901 and conventional loudspeakers was extensive. The plaintiff actually precipitated the controversy by using a market strategy that emphasized the unconventional design of the Bose 901. Unlike the record in Bruno & Stillman, which was silent with regard to the scale and nature of the plaintiff's promotional efforts, the record in this case fully discloses the types of promotional efforts used by the plaintiff and the degree to which they were employed. The extent of the plaintiff's advertising alone might very well justify a holding that the plaintiff is a public figure. Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 274 (3d Cir. 1980) (advertising blitz).

In addition to its extensive advertising of the Bose 901, however, the plaintiff also actively sought to have reviewers test and review the Bose 901, and then incorporated such written reviews in its advertising brochures. These actions by the plaintiff clearly "invited public attention, comment, and criticism." Steaks Unlimited, supra, 623 F.2d at 274.

Gertz suggests that at least two factors in addition to those discussed in Bruno & Stillman are to be considered in determining whether a plaintiff is a public figure. First, the Court noted in Gertz that public officials and public figures usually enjoy greater access to the media than private individuals and can thereby counteract the effects of false statements.[39] Second, the Court pointed out that public officials

and public figures have voluntarily assumed the increased risk of defamatory falsehood that accompanies their notoriety, at least to the extent that their own conduct has precipitated that notoriety.[40]

Both factors militate in favor of holding Bose to be a public figure in this case. Bose unquestionably had access to the media to rebut the false statements published in the Consumer Reports Article. In fact, in February 1971, a few days prior to the filing of the complaint in this case, Dr. Bose and Frank Ferguson,[41] the president of Bose Corporation at that time, personally delivered copies of the unfiled complaint to the United Press International, the New York Times, Business Week, and the Boston Herald Traveler. Each of those organizations subsequently published an article detailing

Bose's charges against CU. In addition, Bose continued to have access to the media to extensively advertise its product.

It is also clear that Bose voluntarily assumed the increased risk of injury from defamatory falsehood. Bose not only extensively advertised the Bose 901, but also actively sought to have its product reviewed by product commentators. Bose then used reprints of the published reviews as part of its advertising campaign. By soliciting such reviews Bose voluntarily assumed the increased risk of injury from defamatory falsehood which naturally followed.

Based on the foregoing analysis under Gertz and Bruno & Stillman, the Court rules that Bose is a public figure, at least with respect to the limited issues of the charac-

teristics and quality of the Bose 901. Consequently, the plaintiff is required to show, by clear and convincing proof, that the false statements published by the defendant were published with the knowledge that they were false or with reckless disregard of their truth or falsity.

Motivation

A significant portion of the testimony at trial concerned Seligson's motivation to disparage the Bose 901. Motivation, of course, is not an element of the tort of product disparagement. In this case, however, the defendant suggests that the absence of any possible motive to disparage militates strongly against a finding of actual malice. Most of the testimony focused on the effect of Seligson's patent on his own evaluation of the Bose 901.

According to the plaintiff, if the Seligson patent had ever been commercialized[42] it would have competed directly with the Bose 901 in the marketplace. The plaintiff claims that the desire to head off such prospective competition provided the motivation for Seligson to downgrade the Bose 901.

The defendant disputes the plaintiff's suggestion that Seligson's patent provided a motive for downgrading the plaintiff's product and offers the following three arguments to support its position. First, Lefkow, as well as Seligson, approved the Article and Lefkow had no reason to downgrade the Bose 901. The plaintiff responds that Lefkow, as Seligson's friend and subordinate, had reason to acquiesce in Seligson's decision to disparage the Bose

901. Second, Seligson had no reason to single out the Bose 901 for criticism, rather than any other loudspeaker system, if his intent was simply to smooth the way for his own product. The plaintiff counters this argument by suggesting that Seligson recognized that the Bose 901 was the best loudspeaker system on the market and therefore naturally aimed his attack at the Bose 901. Third, according to the defendant, by the time of the loudspeaker tests in November 1969, Seligson had lost all interest in developing a commercial product from his invention. The plaintiff relies on Seligson's execution of the Menden Agreement to refute the suggestion that Seligson had lost all interest in commercializing his patent. In the plaintiff's view, if Seligson had really lost all interest in commercializing his

patent, he would never have spent so many hours working to produce the model called for by the Menden Agreement.

Having reviewed the record and considered the demeanor of the witnesses involved, especially that of Seligson, the Court finds that the possible commercialization of his own patent did not influence. Seligson's evaluation of loudspeakers for the Article. Specifically, the Court finds that Seligson did not downgrade the Bose 901 in order to smooth the way for his own invention.

It does not necessarily follow from this finding, however, as the defendant suggests, that Seligson therefore had no reason at all to downgrade the Bose 901. The record discloses at least two other influences that could have caused Seligson to make deprecatory comments about the Bose 901. First,

the plaintiff suggested, but presented scant proof, that the defendant's magazine has a built-in bias against higher-priced products because it claims to save money for consumers. According to the plaintiff, such a bias would lead the defendant to disparage higher-priced products such as the Bose 901. Second, according to Dr. Bose, the defendant's executive officer, Walker Sandbach, stated that CU resorts to the use of "sarcasm" and "spice" in order to boost circulation. Dr. Bose testified, without contradiction, that the defendant's officers told him that a survey supported their belief that consumers read Consumer Reports for entertainment rather than for product information. Dr. Colston Warne, the chairman of CU's board of directors, told Dr. Bose that the readers of Consumer Reports "love to

read about vermin hair in Campbell soup."[43] The desire to inject a little "sarcasm" and "spice" is another possible motivation for Seligson's attribution of grotesque qualities to the Bose 901.

Thus, although the Court has found that Seligson's patent did not motivate him to downgrade the Bose 901, the Court cannot justifiably say that there was no possible reason for Seligson to disparage the Bose 901. Consequently, the Court will not indulge the inference, suggested by the defendant, that because there was not motivation to disparage, there could be no actual malice.

Actual Malice

In any case in which the actual malice standard is applicable the plaintiff bears the heavy burden of proving that the defen-

dant published false statements with a "high degree of awareness of their probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1967). Despite its formidable burden, the plaintiff in this case has consistently maintained throughout the pendency of this action that it would be able to show, with clear and convincing proof, that the statements in the Bose 901 Portion of the Article were published by CU with the knowledge that they were false or with reckless disregard of their truth or falsfty.

The plaintiff contends that, because the statement about wandering instruments which

appeared in the Article conflicted directly with the testimony of Seligson and Lefkow concerning their observations, both Selgison and Lefkow must have known that the statement in the Article was false. The plaintiff does not ask the Court to infer the existence of actual malice from falsity alone, but to couple the falsity of the statement with the fact that Seligson and Lefkow, who made the actual observations, must have known that the statement was false.

To rebut the inference of actual malice which the plaintiff seeks to establish, the defendant places great emphasis on the testimony of Seligson and Lefkow, who consistently professed their good faith belief in the accuracy of the Article as written. Because Seligson wrote the words upon which

the false statement in the Article was based, it is his state of mind that is critical.[44] On cross examination Seligson testified as follows concerning the "instruments" that "tended to wander about the room."

> Q. Mr. Seligson, why did you use the words "tended to wander about the room" to decribe what you have drawn on the board?
>
> A. Well, I don't know what made me pick that particular choice of words. Would you have been more satisifed if we said "across" -- I think not -- instead of about. I have the feeling you would have objected in either event. The word "about" meant just as I drew it on the board. Now, I so testified in my deposition -- Tr. 9-153.

Thus, according to Seligson, the words used in the Article--"About the room" -- mean something different to him than they do to the populace in general. If Seligson is to be believed, at the time of publication

of the Article he interpreted, and he still interprets today, the words "about the room" to mean "along the wall." After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its plain ordinary meaning.

Based on the above finding that Seligson's testimony to the contrary is not credible, the Court further finds that at the time of the Article's publication Seligson knew that the words "individual instruments . . . tended to wander about the

room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test." Consequently, the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity.

Lanham Act and Unfair Competition

Count I of the complaint in this action alleges unfair competition. Count II of the complaint charges that the defendant violated Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a)(1976), by misrepresenting the nacure of its own goods -- Consumer Reports magazine. The alleged mis-

representation that provides the basis for the claims made in both Counts I and II is CU's statement, contained in each issue of Consumer Reports, including the May 1970 issue, that "CU pledges that any opinions entering into its Ratings of products shall be as free of bias as it is possible to make them."[45]

According to the plaintiff, Seligson's patent on a prospectively competing loudspeaker system introduced bias into CU's ratings of loudspeakers, thus causing CU's statement to be false. The Court has already found, supra. p. 39, that Seligson's patent did not influence his rating of the tested loudspeakers and specifically did not influence his rating of the Bose 901. Although the plaintiff also suggested that Consumer Reports has a built-in bias against

higher-priced products, it offered insufficient evidence on this issue to warrant a finding that CU was biased.

After a careful review of the testimony at trial, the Court concludes that the plaintiff has not satisfied its burden of proving by a preponderance of the evidence that bias in fact entered into CU's ratings of loudspeakers. The matter is still entirely within the realm of speculation. Accordingly, judgment will be entered for the defendant with respect to Counts I and II of the complaint.

Conclusion

The Court has ruled that the plaintiff has not sustained its burden of proof on Counts I and II of the complaint. Judgment will therefore be entered for the defendant with respect to those Counts. The Court

has also ruled that the plaintiff has sustained its burden of proving, with clear and convincing proof, that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity. Therefore, with regard to Count III of the complaint, which alleges a claim of product disparagement, judgment will not be entered for either party until a separate trial is held on the issue of damages.

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U. S. Senior District Judge

Footnotes

1. Without seeking to apportion responsibility for the profusion of filings in this case, the Court simply notes that the files generated in this case by only two parties are now well over one foot in depth.

During the course of the trial the Court deferred its rulings on two evidentiary questions:

1) The admissibility of DX-AB (warranty registration cards); and
2) The admissibility of testimony by Dr. Bose concerning a letter dated December 12, 1964, which was written by Arnold L. Seligson to a patent attorney. Tr. 3-67 through Tr. 3-75.

After further consideration of the arguments and the memoranda of counsel, the Court overrules the plaintiff's objection to DX-AB and rules that DX-AB be admitted into evidence. The Court also overrules the defendant's objection to the admission of Dr. Bose's testimony concerning the Seligson letter because the objection bears only on the weight to be given to that testimony, not on its admissibility.

References in this Opinion to documents filed in this case will be made in the following manner.

Plaintiff's and Defendant's Exhibits will be referred to by the notation "PX" or "DX" followed by the exhibit number. Transcript pages will be referred to by the notation "Tr" followed by the appropriate page number. The "Stipulation of Undisputed Facts," filed by the parties at the beginning of the trial, will be referred to as "Stip. A." In that stipulation the parties stipulated that there was no dispute as to certain facts set forth in "Plaintiff's Requested Findings of Fact (Before Trial)" and in "Defendant's Statement of Uncontested Facts." Therefore all references to Stip. A will be followed by the notation PRFOF or DSOUF, followed by the appropriate paragraph number.

3. A driver is the element within a loudspeaker that physically displaces air in order to produce sound. Stip. A, PRFOF 22.

4. Bose advertised in High Fidelity, Stereo Review, Audio, Hi-Fi Buying Guide, and American Record Guide, in addition to other high fidelity magazines. Stip. A, DSOUF 16.

5. Bose advertised in Saturday Review, Rolling Stone, Playboy, and other publications with nationwide distribution. Stip. A, DSOUF 16.

6. Bose estimates that it distributed to the general public at least 1,000,000 copies of each of at least seven reviews

that it reprinted. Stip. A, DSOUF 26.

7. Each December issue of Consumer Reports is in the form of a paperback book of approximately 400 to 450 pages, called the "Buying Guide Issue" of Consumer Reports. The "Buying Guide Issue" contains information reprinted from prior issues of Consumer Reports which have been published over a period of several years. Stip. A, PRFOF 5.

8. Dr. Green defined psychoacoustics as being the study of "acoustics as it relates to reactions of people hearing sound." Acoustics is the study of the physical properties of sound and does not generally involve the human observer. Psychoacoustics deals with "what people hear and the mechanism by which they hear it." Psychoacoustics, a branch of psychophysics, is a discipline that lies on the border of physics and psychology. Tr. 14-5.

9. The following objective tests were performed:

   1) Measurements such as height, depth, length, color, etc. were made by simple observation of the loudspeaker cabinet itself.
   2) Electrical characteristics, such as admittance, were measured both before and after a break-in period.
   3) The electrical impedance was measured.
   4) Frequency response was measured in an anechoic chamber and in CU's

listening room.

5) The low frequency response was measured in an anechoic chamber.

6) Total harmonic distortion was measured.

7) The polar response of the loudspeakers was measured.

Tr. 7-3, 4.

A portion of the evidence produced at trial concerned the disconnection of one of the drivers in one of CU's Bose 901 loudspeakers. The plaintiff argues that the defendant tampered with the loudspeaker in order to alter subsequent test results. The Court shares the plaintiff's concern that the evidence in this case may have been tampered with at some time. Nevertheless, the Court is satisfied that CU's Bose 901 loudspeakers were in proper working condition at the critical time -- when they were tested in 1969 and 1970. The impedance measurements taken in 1969 confirm that all the drivers were functioning at that time. If someone did tamper with the loudspeaker at a subsequent time it would, of course, be reprehensible, but it would not affect the Court's analysis of the evidence.

10. Seligson felt that the A-B listening test worked to the disadvantage of the Bose 901 because that test only asked the listening panel to judge whether the tested loudspeaker sounded similar to the reference loudspeaker, which was a conventional, forward-radiating loudspeaker. Seligson thought

that because "the Bose 901 had a type of aural space that was different from the forward-radiating loudspeakers . . . such a difference would crop up unfavorably to the disadvantage of the Bose." Tr. 11-71.

11. The Bose 901 and the Harman-Kardon HK-50 loudspeakers were chosen for the "special listening test" because of the special sound characteristics that were claimed in their behalf by their manufacturers. No other tested loudspeakers were subjected to the "special listening test." Tr. 13-126, 127, PX-9. The "special listening test" conducted on the HK-50 loudspeakers was discontinued very quickly because no unusual auditory effects were noted when listening to them. Tr. 7-101, 102.

12. CU contends that the cricket test was conducted on January 20, 1970. The plaintiff, on the other hand, contends that the cricket test never took place and that the results of the test were entirely fabricated by Seligson and Lefkow. To support this contention the plaintiff relies on a weekly progress report (PX-23) for the loudspeaker testing project, dated January 14, 1970, which states, "All tests finished" on the same line as the figures "2/1". The plaintiff argues that this statement indicates that all tests on the loudspeaker testing project were completed by January 14, 1970, six days before the cricket test supposedly took place. Therefore, according to the plaintiff,

the cricket test, if it took place at all, was conducted after the testing project had already been concluded, and the results of such a test could not have formed a basis for the text of the Article. CU contends that the figures "2/1" indicate that the author of the report projected that all tests would be finished by February 1, 1970.

The plaintiff also relies on the fact that the cover of the project data book (PX-9) containing the results of the cricket test bears the notation 12/20/70 on a line following the words "Date Started." Since the Article was published in May 1970, any data generated in December 1970 or thereafter could not have formed the basis of statements contained in the Article. CU contends that Lefkow incorrectly transposed the date 1/20/70, and wrote 12/20/70 on the cover of the project data book instead. The plaintiff further relies on the failure of the defendant to produce the "cricket tape" which the defendant allegedly used in the cricket test.

After carefully considering the foregoing evidence, the Court finds that the cricket test did indeed take place. The Court does not consider the inconsistencies pointed out by the plaintiff to be particularly significant, especially in view of the witnesses' detailed description of both the tape and the test and the conformity of that description with the description contained in the Article.

13. Seligson described his idea as follows:
These experiments are directed to the development of a loudspeaker which produces sound by (1) ionizing air molecules (2) accelerating them in one direction by a high d-c potential, which accelerates the air, by collision effects, in the same direction; (3) modulating the air flow by modulating the potential applied, to produce sound. PX-12, p. 1.

14. Letter from A. L. Seligson to Robert W. Fiddler, stapled to p. 26 of PX-12.

15. Compare the final version of the Bose 901 Portion of the Article as it appears on p. 4, supra, with Seligson's draft of the Bose 901 Portion as contained in the Report to Editorial:

> The Harman-Kardon HK-50 omnidirectional speakers, the Bose system and a pair of check-rated loudspeakers (ADC 303ax) were compared in an instantaneous A,B,C listening experiment to ascertain what effect the purported special sound radiation characteristics of the HK-50 and Bose systems have upon stereo reproduction. First, a special test tape was prepared in CU's anechoic chamber. This was a stereo recording of a small sharp-sounding noisemaker ("cricket") as it moved in seven equal distinct steps from extreme left to extreme right. Listeners in

CU's sound room were asked to judge the direction from which the sound appeared to come by listening to each of the three stereo systems when seated directly between the two loudspeakers -- the ideal listening location -- and when seated to the extreme side of the room. In all three cases, the listeners were able to accurately localize the sound when seated in the ideal listening position but were unable to accurately locate the sound when seated in the extreme listening position. From this experiment CU derives the conclusion that with respect to accurate stereo sound localization of distinct sharp noises, or clicks, at least, there is no significant difference between the conventional, omnidirectional or Bose concept of loudspeaker design.

"A second experiment was conducted. We repeated the A,B,C listening experiment this time using as program material, a wide variety of stereo records. Repeated observations from every position in the listening room discerned little or no difference between the Harman-Kardon and the conventional loudspeakers either with respect to accurate localization of instruments or with respect to overall impressions of the recording "space". Now, however, the Bose was outstand-

ingly different from the other two systems. Sound from the Bose seemed considerably more spacious and reverberant with a greater feeling of ambiance, giving an effect equivalent to having the wall next to the speakers in the listening room drop away revealing a vastly more open acoustically live space beyond. After listening to a number of recordings this way, it became apparent that precise localization of musical instruments (as opposed to the sharp noised cricket of experiment 1 (the cricket test)) appeared to be inferior to that of the standard loudspeaker system even when the listener was seated in the ideal listening position for good stereo, but that the overall heightening of the acoustic ambiance held up well in just about any listening position. Continued listening revealed a number of other disturbing aspects to the Bose system. Instruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room; a violin seemed about 10 ft. wide, a piano stretched from wall to wall, etc. These effects were entirely innocuous when listening to orchestral music but we can see how they might become quite disturbing when listening to soloists. Then the idea occurred to us to see what might happen when the Bose

loudspeaker system reproduced monophonic records and lo and behold, the system imparted the same kind of vast spaciality to them as it did to stereo records producing the same kinds of physical size distortions noticed in the case of stereo records. Nevertheless, many listeners will find the overall effect produced by the Bose exciting, we think they may be willing to overlook the system's deficiencies to attain these effects. Audio purists, beware.

"Insofar as the sound quality of each unit (sic), the Harman-Kardon would have been placed in the lower group of medium accuracy loudspeakers. Its sound was distinctly hollow and muddy. The Bose produced relatively good sound quality and would rank somewhere between the high and medium accuracy group about on a par with the AR 3A. Its main fault was in the bass. The small individual loudspeakers that the Bose system uses are not by themselves capable of radiating extreme low frequencies, hence a need for the equalizer box, the electronic gadget that one plugs into the amplifier or receiver. Among other functions, this electronically provides the bass to compensate for the small loudspeaker weaknesses and in fact, it succeeds in doing a pretty remarkable job enabling

the Bose to reproduce extremely deep bass sound. But the combination of equalizer and loudspeaker tends to overemphasize the middle bass giving it a somewhat overly-full heavy sound in this register.

(Material pertaining to Harman-Kardon HK-50 loudspeakers omitted)

Essential Facts

"The Bose loudspeakers are irregularly shaped boxes having the overall dimension of 13 x 20 3/4 x 13 in. and each weighing 34 lbs. The impedance of each loudspeaker was 9 1/2 ohms (minimum and nominal) and they required at the very least an amplifier power of 30 watts (for deepest bass 50 watts would be still better)." PX-10, p. 27-33.

16. Many other terms have also been used in referring to the tort of product disparagement. Among them are trade libel, slander of title, slander of goods, disparagement of title, disparagement of goods, unfair competition, interference with prospective advantage, and injurious falsehood. W. Prosser, Injurious Falsehood: The Basis of Liability, 59 Colum. L. Rev. 425 (1959).

17. The parties have agreed that the laws of the states of Massachusetts and New York are identical with respect to the elements of the tort of product

disparagement, thus eliminating choice of law as an issue in this case.

18. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1973), the Supreme Court held in a personal defamation action that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

19. The plaintiff concedes that the following statements contained in the Article might be construed as complimentary to the Bose 901:

> When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.

20. The complimentary effect created by the language quoted in note 19, supra, is clearly undercut by the following paragraph which is introduced by the word "But," and contains language that can hardly be considered complimentary:

> But after listening to a

number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same spacial openness and size distortions as the stereo records.

21. Plaintiff's Requested Findings of Fact and Conclusions of Law, p. 197.

22. The terms "roughness index," "spectrum index," and "low frequency index" are not generally accepted terms within the field of loudspeaker testing. Rather, they are terms that were invented by Seligson and Lefkow in an ad hoc fashion to refer to the testing procedure they followed. Tr. 9-103.

23. At least for the purposes of this trial, a conventional loudspeaker was defined as a loudspeaker whose drivers are mounted on the front panel and

radiate sound in a forward direction directly out into the listening room. Tr. 9-110.

24. Although the Bose 901 was tested in almost the same manner as the other tested loudspeakers, it was not rated along with the other loudspeakers because it was not in the medium price range. PX-2, p. 272, 277-78; Tr. 6-159, 160.

25. The loudness of sound is usually measured in units known as "decibels," which correspond to varying sound pressure levels on a logarithmic scale. The number of decibels increases as loudness increases. The scientific notation for decibels is "dB." Tr. 2-43; PX-1, p. 109.

26. The above quoted words contained in the Article were based on the following words contained in Seligson's draft Report to Editorial (PX-10, p.33): "The impedance of each loudspeaker was 9 1/2 ohms (minimum and nominal) and they required at the very least an amplifier power of 30 watts (for deepest bass 50 watts would be still better)."

27. CU attempted such a measurement but failed to use the same type of recordings that it used in its original tests of the Bose 901.

28. The above quoted language was based on the following statements in

Seligson's draft Report to Editorial (PX-10):

"After listening to a number of recordings this way, it became apparent that precise localization of musical instruments (as opposed to the sharp noised cricket of experiment 1 (the cricket test) appeared to be inferior to that of the standard loudspeaker system even when the listener was seated in the ideal listening position for good stereo, but that the overall heightening of the acoustic ambiance held up well in just about any listening position. Continued listening revealed a number of other disturbing aspects to the Bose system. Instruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room; a violin seemed about 10 ft. wide, a piano stretched from wall to wall, etc. These effects were entirely innocuous when listening to orchestral music but we can see how they might become quite disturbing when listening to soloists. Then the idea occurred to us to see what might happen when the Bose loudspeaker system reproduced monophonic records and lo and behold, the system imparted the same kind of vast spaciality to them as it did to stereo records producing the same kinds of physical size distortions noticed in the case of stereo

records."

29. The following terms all seem to have been used by various persons at various times during the trial to refer to the same phenomenon: apparent source, sonic image, effective source, sound image, phantom source, acoustic image, auditory image, auditory source, image, source, apparent sound image, and apparent sound source. The confusion wss compounded when the questioners and witnesses spoke about the size or location of the "apparent sound source." For example, references to size included the following terms: size of the sound, spacial dimension of the sound, apparent size of the source, and size of the image.

30. Tr. 18-121.

31. Dr. Bose testified that an "audiophile" is a person "who specializes in audio equipment in his home." Tr. 4-28.

32. Tr. 7-103, 12-155, 14-110.

33. In order to rebut the charge made by Dr. Bose that it is scientifically impossible for anyone to perceive instruments that "tended to wander about the room," the defendant presented the testimony of its expert, Dr. Green, who testified at length concerning a person's ability to perceive that the apparent sound source of a particular sound had moved away from the wall out into a room. However, because both mem-

bers of CU's panel, Seligson and Lefkow, testified that the wandering sounds were confined along the wall, Dr. Green's testimony concerning a person's ability to perceive that an apparent sound source had moved out into the room is, strictly speaking, irrelevant.

The defendant also places reliance on the testimony of its technical director, Monte Florman, who claims to have heard certain unusual auditory effects when listening to the Bose 901. After appraising Florman's demeanor and the substance of his testimony, however, the Court finds that Florman's testimony is wholly untrustworthy and is not credible. Consequently, to the extent that Florman's testimony differs from that of Seligson and Lefkow, it has been disregarded.

34. A musical instrument radiates a single frequency at different intensities depending upon the direction. A graphical representation of the intensity versus direction yields what is known as a polar radiation pattern for that single frequency. Tr. 2-65,66, 19-83,84.

35. The defendant claims that the following limitation contained in the Article somehow mollifies the harmful effect of its false statement:

> With orchestral music, such effects seemed inconsequential.

> But we think they might become annoying when listening to soloists.

The defendant, however, offered no evidence to prove that a significant number of persons limit their musical tastes to orchestral music. Even in orchestral music there are often solo passages. Therefore, the Court does not agree that the above-quoted statement in any way cushions the blow of the earlier statement that instruments "tended to wander about the room." In fact, the subsequent statement enhances the disparaging effect of the earlier one because it characterizes the effects heard as possibly becoming "annoying."

36. The Court subsequently made clear that "convincing clarity" is identical with "clear and convincing proof." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1973). Under New York Times only actual malice must be demonstrated with clear and convincing proof. The plaintiff must satisfy the traditional preponderance of the evidence standard with respect to the other issues in the case.

37. Bruno & Stillman, Inc. v. Globe Newspaper Co., Nos. 80-1172 and 80-1173 (1st Cir. October 17, 1980) (Plaintiff corporation not a public figure under Gertz based on record presented to court); Vegod Corp. v. American Broadcasting Companies, Inc., 25 Cal. 3d

763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979) (Plaintiff corporation not a public figure under Gertz -- "Criticism of commercial conduct does not deserve the special protection of the actual malice test." 25 Cal. 3d at 770, 603 P.2d at 18, 160 Cal. Rptr. at 101); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (d.d.c. 1976) (All corporations are public figures under Gertz, but are required, under Rosenbloom, to prove actual malice only if publication concerned matter of public interest); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) (Plaintiff corporation was public figure under Gertz for limited range of issues); Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) (Plaintiff corporation was public figure under Gertz for limited range of issues).

38. Bose spent approximately $100,000 to advertise and promote the Bose 901 during the fiscal year ending June 30, 1969. During the next year, ending June 30, 1970, Bose spent at least $200,000 on advertising and promotion. In the fiscal year ending June 30, 1971, Bose spent at least $300,000 on advertising and promotion. Stip. A, DSOUF 27.

39. "The first remedy of any victim of defamation is self-help -- using available opportuities to contradict the lie or correct the error and thereby to minimize its adverse impact on repu-

tation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statement than private individuals normally enjoy." "Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1973) (footnote omitted). Whether this factor is to be accorded substantial weight is open to question in view of the following statement in Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977), which was quoted with apparent approval by the court in Bruno & Stillman, supra, slip op. at 12, n. 5.

> "The 'access to media' argument is no more than a makeweight. There are many public figures who are so scorned and reviled by the media as to have little or no access for purposes of counteracting a libel. These remain yet public figures." Reliance Insurance, supra, at 1348.

40. "Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1973).

41. In February 1971 CU published an advertisement for Consumer Reports

(PX-19) which included a number of illustrations of unhappy consumers, dissatisfied with their purchases because they had not read Consumer Reports before making their purchases. Each was identified by a first name and a last initial which was the first letter of the first name: Ann A., Bill B., etc. The advertisement depicted a woeful consumer, identified as Frank F., with a pair of loudspeakers that were obviously not Bose 901 loudspeakers. The plaintiff, perhaps exhibiting a certain degree of oversensitivity, contends that CU deliberately selected "Frank F." to go with the illustration of loudspeakers as a slap at Frank Ferguson, who was then president of the plaintiff. The plaintiff did not present any proof that a significant number of consumers were aware of Ferguson's status as president of the plaintiff, nor did it offer any evidence to show what harm the advertisement could have caused the plaintiff. In these circumstances the Court finds that CU did not publish the advertisement (PX-19) with Frank Ferguson in mind or with the intention of making a veiled reference to the plaintiff.

42. There was uncontradicted testimony to the effect that Seligson's patent had not been commercialized as of the time of trial. Tr. 8-59.

43. T4. 3-14. Florman referred to CU's editorial process as treading "the fine line between a strictly technical pre-

sentation and a readable report intended for laymen." PX-33, p. 3.

44. The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that "tended to wander about the room." Lefkow testified that the Article as a whole accurately reflected CU's test data. Nevertheless, to the extent that Lefkow, as Seligson's subordinate and friend, would be expected to substantiate Seligson's position, right or wrong, his testimony can be discounted. In addition, Lefkow was never specifically questioned about the critical words "about the room."

45. The defendant did not argue, based on a literal reading of the above-quoted language, that the pledge to be free from bias applies only to rated products and not to products such as the Bose 901, which was not "formally rated."

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSE CORPORATION,
Plaintiff,

v. CIVIL ACTION
No. 71-481-C

CONSUMERS UNION OF U.S., INC.,
Defendant.

OPINION

December 30, 1981

CAFFREY, Ch. J.

This is a civil action, brought to obtain money damages and other relief for false statements published by the defendant about the plaintiff's product. This opinion supplements an opinion filed by the Honorable Anthony Julian, Senior United States District Court Judge and reported as Bose Corporation v. Consumers Union of United States, Inc., 508 F.Supp. 1249

(D.Mass. 1981). This opinion constitutes the Court's findings of fact and conclusions of law with respect to the damages issues in the case and renders a final judgment for the plaintiff on the product disparagement claim.

Summary of Prior Proceedings

The plaintiff, Bose Corporation (Bose), a manufacturer of loudspeaker systems and other audio equipment, brought this civil action in 1971 against the defendant, Consumers Union of United States, Inc. (CU), a consumer product testing and reporting organization. Bose claimed product disparagement, unfair competition, and Lanham Act violations on the basis of the defendant's publication of a rating of the plaintiff's product, the Bose 901 Series loudspeaker system, (the Bose 901). Judge

Julian severed the issue of liability from the other issues in the case and ordered that a trial be held to determine damages only in the event that the plaintiff prevailed on the other issues. 508 F.Supp. 1249 at 1251.

After an extended trial on the liability issues, the Court ruled that the plaintiff had failed to prove allegations of unfair competition and Lanham Act violations. Accordingly, the Court entered judgment for the defendant with regard to counts I and II of the complaint. With regard to the claim of product disparagement, the Court ruled that the plaintiff had proved that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity.

Id. at 1277.

The second half of this nonjury trial, considering the damages issues only, was held before the undersigned on June 4, 5, and 8, 1981. The following findings of fact and conclusions of law are based on evidence introduced at that trial. Together with Judge Julian's findings, these findings represent final disposition of the case.

Summary of Findings on Liability

The Consumer Reports Article: On pages 272 through 279 of the May 1970 issues of consumer Reports CU published an article entitled "Loudspeakers" (the Article). The Article contained CU's evaluation of the quality and performance of twenty-four different loudspeakers based on CU's tests of the loudspeakers. In a section (the Bose 901 Portion) boxed off from the main body

of the Article, under the heading "Some loudspeakers of special interest," appeared comments about the Bose 901. Id. at 1252.

The Article contained some complimentary statements about the Bose 901, but the effect of that language is more than outweighed by other statements that are clearly critical of the Bose 901. Id. at 1260. The Court specifically noted that the following paragraph undercut the positive impact of the Article:

> But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.

> On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same special openness and size distortions as the stereo records.

Id. at 1260 n.20. See Id. at 1252-1254 for the complete text of the Bose 901 portion of the article. Judge Julian concluded that the Article, when read as a whole is disparaging.

Isolating statements in the Article for purposes of determining liability, Judge Julian found that while CU's use of the words "panel" and "panelists" was misleading, it did not cause harm to the plaintiff. Id. at 1260. Likewise, the Court found that the false implication that the accuracy of the tested loudspeakers was determined in an objective manner did not harm the plaintiff. Id. at 1262. CU's rating of the Bose 901 as "between the high- and medium-accuracy groups" was found to be only an

opinion which cannot be proven true or false. Id. at 1262. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

The Court made no finding as to whether the impact of that rating was harmful to the plaintiff.

Power Requirements

With respect to the power requirements of the Bose 901, the Article stated: If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per channel for the deepest bass response. Id. at 1263.

Judge Julian found that on the truth of this issue, neither party had produced trustworthy evidence. On the basis of the record he found that the matter was entirely

within the realm of speculation, and that accordingly plaintiff had failed to sustain its burden to prove the statement was false. Id at 1263-1264.

Size and Movement

The bulk of the testimony at the first proceeding concerned the paragraph quoted above, which Judge Julian found undercut the complimentary statements about the product and rendered disparaging the Article as a whole. The operative statement in the paragraph is "worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." Dissecting that sentence, Judge Julian found that the plaintiff had not proved that the statement about gigantic proportions was false. Id. at 1260. However, he found that the portion of the

statement that instruments "tended to wander about the room" was both false and disparaging to the plaintiff. Id. at 1268. Judge Julian specifically found:

> A statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product. That such a harmful effect was intended is demonstrated by the use of the word "worse" to introduce the sentence. Use of the word "worse" obviously indicates that what preceded was a deficiency but what followed would be an even greater deficiency in the product.

Id.

The Court also found that the subsequent statement to the effect that the wandering effect might be annoying when listening to soloists enhanced the disparaging effects of the false statement. Id. at 1268 n.35.

Because Dr. Bose testified that the most frequent complaints he heard from dealers

and consumers concerned "the enlarged and wandering instruments and the statement about gigantic power required" the Court found that the false statement could not be considered a de minimus violation of plaintiff's rights. Id. at 1269.

Finding that the statement was false and disparaging, the Court went on to find that the defendant had not observed the required standard of care in making the statement. Applying the rigorous test enunciated in New York Times v. Sullivan, 376 U.S. 254 (164), the Court found that the plaintiff proved clearly and convincingly that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity. Id. at 1277. The remaining issue is what relief is to be granted

the plaintiff.

Scope of Relief

The tort of product disparagement, as distinguished from individual or corporate defamation, is a narrow cause of action. The interests protected are not those of the reputation of the corporation or the intangible concerns peculiar to individual reputation such as community standing, privacy and psychic well-being. Bose Corporation v. Consumers Union of United States, Inc., 508 F.Supp. 1249 at 1270-71; Note, Corporate Defamation and Product Disparagement; Narrowing the Analogy to Personal Defamation, 75 Colum. L. Rev. 963, 980-81 (1975).

A cause of action for product disparagement is made out only when the plaintiff has satisfactorily proved that it suffered

special damages flowing from a false statement concerning the nature or quality of plaintiff's product. Dooling v. Budget Publishing Co., 144 Mass. 258 (1887); Marlin Firearms Co. v. Shields, 171 N.Y. 384 (1902). The tort exists to provide redress only for tangible and direct pecuniary loss, a purely economic injury to which society accords a lesser value than reputational interests.

Under the law of both Massachusetts and New York "the plaintiff must allege and prove special damages -- specific proof of pecuniary loss -- before being entitled to recover." 508 F.Supp. at 1249 citing Dooling and Marlin, supra; see also Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435 (1960); Restatement (Second) of Torts Sections 623A, 633 (1976).

Special damages consist of the pecuniary loss that results directly from the effect of the wrongful conduct of the defendant, in this case, lost sales and expenses necessary to counteract the effect of publication. Id. Section 633. Lost sales are those sales which plaintiff would have made if the defendant had not disparaged the plaintiff's product.[1]

Injunctive Relief

Plaintiff in this action also seeks injunctive relief to prevent republication

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1. What sales might have been if defendant had published a highly favorable review is not the appropriate measure of damages. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Testimony on this question was admitted at trial as relevant for its insight into the cause and effect relationship between CU reports and product sales.

by the defendant of the false statement and to compel the defendant to publish a retraction.

Without reaching the question whether the first amendment would permit either type of injunctive relief in an action for product disparagement against a media defendant[2] I rule that injunctive relief is not warranted by the facts of this case.

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2. See, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Under Tornillo, the government may not require "balanced" reporting consistently with the First Amendment. In that case, the Supreme Court invalidated Florida's "right-of-reply" statute. That law required a periodical which had commented unfavorably on a political candidate to provide equal space free of charge to that candidate for response. The law's imposition of a penalty because of refusal to print certain copy, the Court found, was tantamount to a prohibition of publication of specified material and, consequently, violative of the First Amendment. Id. at 256. The Court noted that its holding did not depend on whether compulsory

After careful consideration of the record before the Court, I find that the false and disparaging statement complained of here was published more than ten years ago; that the defendant has not since republished or threatened to republish the statement; and that the plaintiff has failed to prove that the defendant is likely to republish the statement or that the harmful effects of the defamation persist to this day and that therefore there is no need for an injunction here to protect any interest of Bose. Therefore, I rule that the scope of relief

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balance imposed additional costs on the newspaper or actually restrained its publication of any material. Rather, the holding was based on the Court's recognition that the decision whether fairly or unfairly to evaluate the issues of public concern was exclusively committed to editorial control and journalistic discretion. Id. at 258.

in this action for product disparagement is limited to those pecuniary damages that plaintiff proves were the result of defendant's false and disparaging statement.

Causation

In a product disparagement case, the plaintiff must prove that special damages resulted from the publication and that the disparagement was a substantial factor in inducing others not to buy the plaintiff's product. Defendant seeks to apply the doctrine of the "libel-proof plaintiff" to bar recovery in this case. Such a plaintiff is unable to recover because defendant's libelous statements cannot cause harm to reputation in addition to the harm that is caused by truthful statement. See, e.g., Cardillo v. Doubleday & Company, 518

F.2d 638 (2d Cir. 1975).[3] Essentially, defendant argues that because statements in the article not found false and disparaging by Judge Julian also harmed the reputation of the Bose 901, loss of sales is not

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3. The Cardillo doctrine involves the limited reputational interest of habitual criminals. In Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) the Second Circuit cautioned against extending the doctrine beyond its basic factual context. Id. at 888-889. The Cardillo doctrine has been applied in product disparagement cases in recognition of the importance of First Amendment concerns over the limited reputational interests involved in this type of case. See, e.g., Simmons-Ford, Inc. v. Consumers Union of United States, Inc., 516 F.Supp. 742 (S.D.N.Y. 1981). In that case, the CU article contained much truthful information critical of the product's design and performance. The Court found that "the portion of the article challenged by plaintiffs could not harm their reputation in any way beyond the harm already caused by the remainder of the article." Id. at 750. Bose's claim here is not analogous to the claim in Simmons-Ford.

attributable to the statement that "individual instruments . . . tended to wander about the room."

Defendant's argument is inconsistent with Judge Julian's findings that the statement "could have no effect other than to harm the reputation of the product," and that the statement could not be considered a de minimus violation of plaintiff's rights. 508 F.Supp. 1249 at 1268-1269.

The "libel-proof plaintiff" defense should not be applied here unless defendant's non-actionable statements were the substantial reasons for a decline of sales of the Bose 901 system and, therefore, the wandering instruments statement could have had only a de minimus effect. Therefore on the basis of Judge Julian's findings and the record before me, I rule that

there is no basis in the record of this case for a finding that other statements about the Bose 901 were responsible for any determinable amount of lost sales to plaintiff. Plaintiff thus is not precluded from recovery by the "libel-proof plaintiff" doctrine.

With respect to the false statement about the wandering instruments, I find that the causal connection between defendant's statement and the plaintiff's losses is neither speculative nor remote. Plaintiff need only prove that the defendant's false and disparaging statement was a substantial factor in causing the loss. Restatement (Second) of Torts, supra, Section 632. The defendant may not unfairly place the burden on the plaintiff to prove that no other factor was involved or

to apportion with mathematical certainty and precision the dollar amount of the injury it suffered from each particular statement. Rombola v. Cosindas, 351 Mass. 382, 285 (1966).

I find that Bose's contention that the wandering instruments statement caused particular damage is not a recent invention. In the liability proceeding, Dr. Bose testified that that particular statement, the statement about gigantic power requirements, and the statement about gigantic instruments were the ones most frequently cited by dealers as reasons for decline in Bose system sales. I find that given Judge Julian's finding that most consumers would not literally construe CU's statements about 12 foot violins, Id. at 1265-1266, the portion of the statement that instruments seemed to

grow to gigantic proportions had no significant impact on Bose sales.

I find it less clear that the statement concerning gigantic power requirements had no impact on sales. I find that some portion of the pecuniary loss caused by the CU Article may possibly be attributable to that statement since most consumers owned amplifiers having power of fewer watts per channel than that suggested for use by CU. Bose attempted to counteract the effects of this statement by demonstrating that a low-power amplifier was adequate for use with the Bose 901 system. I find Dr. Bose's testimony on this point persuasive to the extent that such efforts were effective in reducing (but not eliminating) the volume of sales lost due to the gigantic power requirement statement. Accordingly, while

I find that the false statement about wandering instruments had a substantial impact on the reputation of the Bose 901, I find that some de minimus percentage of the total harm should be attributed to this non-actionable statement.

Other Factors

Defendant, through its witness Newell Garfield, introduced testimony attempting to show that other factors unrelated to the CU publication account for the decline in Bose sales over the relevant period. Garfield is a management consultant with no expertise in the loudspeaker industry. His highest formal education consisted of receiving a B.A. degree from Yale, majoring in Sociology and History. I find that his opinions, based on broad market data and economic surveys, were highly speculative.

I find that he was retained only three months before trial and had virtually no knowledge of the actual facts in this ten year antiquity of a case. I reject, without exception, his opinions as being pure guesses, all of which are favorable to the party which paid him very substantially. The only portion of his testimony I find factual is his opinion as to the effect which the introduction of the Bose 501 speaker may have had on sales of the Bose 901. The Bose model 501 speaker was a new product introduced during the relevant sales period. The Bose 501 was described to the public as offering at lower cost many of the performance advantages of the highly acclaimed 901 system. I find that introduction of such a product could be expected to divert some would-be sales of

the Bose 901 to the Bose 501. The effect on the Sales of the Bose 901 of the introduction of the Bose 501 is taken into account in the "Lost Sales" portion of this opinion. However, the defendant has made no attempt to analyze the relevant market in a manner which would persuade me to attribute to this factor more than a marginal effect in depressing sales of the higher priced speaker. Therefore, while this factor cannot be totally ignored, it does not preclude a finding that the CU publication and the false statement contained therein were the substantial cause of the decline in sales of plaintiff's product.

Quantification

The extent to which the product's reputation was harmed in dollar terms obviously depends on the relative importance of the

publication to potential purchasers about to make buying decisions. In the prior proceeding the Court found that "(t)he influence of Consumer Reports on consumers' buying decisions is substantial." During 1970 and 1971 Consumer Reports and CU had a very favorable reputation for independence, integrity, accuracy, and freedom from bias.

Subscribers to Consumer Reports tend to make buying their decisions after consulting reports published in Consumer Reports, and in 1970 millions of readers relied upon the product information published in the magazine. "Many consumers would not think of making a substantial purchase without consulting Consumer Reports." Id. at 1252. As Dr. Bose testified, there is a direct relationship between the reputation of a loudspeaker and sales of the product.

As the defendant's own "marketing expert" conceded on cross-examination, a good reputation tends to increase the sales of a product and a poor reputation tends to decrease the sales of the product.

Unlike the statement about gigantic power requirement, Bose could not minimize the effects of the false statement about "wandering instruments" because even if potential retail purchasers could be shown that the phenomenon was not observable during in-store demonstrations, they still would be concerned about its occurrence when other recordings were played in their homes. CU refused to disclose to Bose the names of the recordings on which the CU "panelists" supposedly had heard the "wandering instruments", so Bose was unable to refute that false claim by making

demonstrations using the same recordings. I, therefore, find that it is clear to a reasonable degree of certainty that the false statement about the wandering instruments was a substantial factor in dissuading a large number of consumers from buying the Bose 901 system.

Lost Sales

Based on evidence and testimony offered at trial, I find that publication of the May 1970 Consumer Reports article caused a decline in the rate of growth of sales of the Bose 901 system during the last eight months of 1970.[4]

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4. These findings are based on the testimony of Phyllis M. Larson, the Accounts Receivable Manager for the Bose Corporation, exhibits introduced in support of that testimony, and the testimony of Dr. Amar G. Bose. Mrs. Larson analyzed invoices of sales of the Bose 901 system from

Prior to publication of the CU Article, the Bose 901 had received the best reviews which ever had been given to a loudspeaker product, and Bose had projected that 1970 sales of the Bose 901 would be approximately 150% of 1969 sales. For the months of January through April, 1970, actual sales of Bose 901 systems to dealers for resale to members of the public increased to 155% of the sales for the corresponding months of 1969. During the last eight months of

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January 1, 1979, to December of 1970. The analysis excluded foreign sales, employee purchases, salesmen's purchases, dealer employees demonstration units, warranty replacements, and other no charge invoices. The totals represented net sales to dealers in the United States of Bose 901 systems for resale to the public. Dr. Bose testified as to the relationship between the sales figures compiled by Mrs. Larson and the CU article, based on his knowledge of the firm's history and the loudspeaker industry.

the year 1970, after the publication of the CU Article, sales were only 120% of sales for the corresponding months of 1969.

I find that if the defendant had not published the Article disparaging the Bose system, sales of the Bose 901 system during the last eight months of 1970 would have been at least 155% of sales made during the corresponding months of 1969; and in the last eight months of 1970 Bose would have sold at least 4,878 Bose 901 systems. Actual sales for the last eight months of 1970 were 3,780 systems. The difference is 1,098 systems. Taking into account the fact that some small portion of this decline in sales is attributable to statements about gigantic power requirements not proved to be false and that some marginal allowance must be made for market variables such as

introduction of the Bose 501, I find that at least 75% of this difference (approximately 824 systems) represents a loss of sales directly attributable to the defendant's publication of the false statement that "individual instruments . . . tended to wander about the room."

Bose would have realized additional net income of at least $129 per unit from the sale of each Bose 901 system which would have been sold during the years 1970-1972 in addition to the systems actually sold. The minimum gross income per system received by Bose from its dealers would have been $300 per system (assuming that the dealers took advantage of all available quantity discounts and discounts for prompt payment), and the variable costs of manufacturing, advertising, and selling the pro-

duct would have been $171 per system, leaving net income of $129 from each incremental sale.

Therefore if plaintiff had sold 824 additional Bose 901 systems during the last eight months of 1970, it would have realized additional net income of $106,296.

Expenses to Counteract False Statements

With respect to plaintiff's claim for special damages for the necessary costs of attempting to counteract false statements published by the defendant, I find: During the year following publication of the May 1970 CU Article, Dr. Bose spent at least half his working time for the plaintiff in attempting to overcome the effects of the false statement about the "wandering instruments." This included time spent in visiting Bose dealers throughout the United

States and attempting to explain to dealer personnel why the phenomenon reported by CU could not have occurred. The time spent by Dr. Bose in attempting to combat the effects of the false statement otherwise would have been spent on other aspects of the plaintiff's business. His salary during that time period was $18,000 per year. Therefore the cost to the plaintiff of the time spent by Dr. Bose in attempting to combat the false statement conservatively computed was at least $9,000.

I find that plaintiff is entitled to recovery of damages in the amount of $106,296 which represents the additional net income that the plaintiff would have realized but for the publication by the defendant of the false statement about the Bose 901 system. I also find that in

addition to the amount for lost sales, the plaintiff is entitled to recovery in the amount of $9,000 for expenses reasonably incurred by the plaintiff in an attempt to minimize the effects of the false statement published by the defendant about the Bose 901 system. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219, 1234-1235 (D.Col. 1976), modified as to damages on damages on appeal, 561 F.2d 1365 (10th Cir. 1977), cert. dismissed 434 U.S. 1052. Accordingly, judgment will enter for the plaintiff in the amount of $115,296 plus interest accrued to the date of judgment.

Andrew A. Caffrey, Ch. J.